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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 136

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 15, 1963.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented for Review	2
Statement of the Case	6
Reasons for Granting the Writ	19

POINT I—The settlement that plaintiff and Inger arranged without D & K's knowledge or participation and consummated without D & K's consent on summation morning did not alter the structure of the case insofar as D & K was concerned. All of the elements which would have had to be established in order to impose ultimate liability upon D & K when the case commenced remained intact. Since, at the outset of the case D & K placed in issue the question of Inger's liability to plaintiff, Inger would first have had to be held liable to the plaintiff before the second phase of the case, the claim over, came into play. The settlement did not do away with the necessity of establishing liability as a prerequisite to the claim over. By settling as it did, Inger could not change the issues; it assumed the burden of proving that it was initially liable to plaintiff as a basis for its indemnity claim; and since both triers of the fact determined that Inger was not so liable to plaintiff, D & K was entitled to judgment dismissing the amended third-party complaint upon the basis of the jury's verdict at the first trial and upon the Court's findings at the second.

The rule of law enunciated by the Court of Appeals that Inger did not have to establish to the satisfaction of the trier of the facts that it was actually initially liable runs contrary to the ex-

PAGE

press provisions of Rule 14(a) F. R. C. P. and is repugnant to the Fifth and Seventh Constitutional Amendments in that it deprives D & K of its due process rights to a trial of the issues raised by the pleadings and the benefit of the jury's determination that the facts were such as to exonerate D & K from liability on the issues as they were properly constituted 24

Analyses of the cases cited by the Court of Appeals 33

Quotations from the authorities which state the rule of law applicable 38

POINT II—On the second phase of the case, the breach of warranty question, plaintiff's sole negligence in causing his own injury cannot serve as a basis for charging D & K with an indemnity liability on a *respondeat superior* theory because negligence of this type, even if called a breach of D & K's warranty, leads to Inger's non-liability to plaintiff rather than to Inger being held liable . 57

Conclusion 63

APPENDIX:

Opinion of the Court of Appeals 67–74

Second District Court Opinion (Abruzzo, J.) 75–93

First District Court Opinion (Bruchhausen, J.) 94–105

CITATIONS

Cases:

Ace Tractor & Equipment Co. v. Olympic Steamship Co., 227 F. 2d 274 35

Aetna Freight Lines, Inc. v. R. C. Tway Company, Inc., Ky. 352 S. W. 2d 372 51–54

American Export Lines v. Revel, 262 F. 2d 122 ..... 27, 30

American President Lines, Ltd. v. Marine Terminals Corp., 234 F. 2d 753, cert. den. 352 U. S. 926 34

PAGE

American Surety Co. v. Ballman, 115 F. 292 31

Atlantic & Gulf Stevedores Inc. v. Ellerman Lines, Ltd., 369 U. S. 355 ..... 11, 25, 26, 32, 57, 58

Billeci v. United States, 298 F. 2d 703 10

Booth S.S. Co. v. Meier & Oelhaf Co., 262 F. 2d 310 61

Boston Woven Hose, &c. Co. v. Kendall, 178 Mass. 232 61

Buhl v. Viera, 328 Mass. 201 26

Caputo v. U. S. Lines Co., 311 F. 2d 413 20

California Stevedore & B. Co. v. Pan-Atlantic S.S. Corp., 291 F. 2d 252 ..... 33, 37

Carney v. Pittsburgh & Lake Erie R.R. Co. (3 Cir. 3/27/63), — F. 2d — 36

Carpenter Paper Co. v. Kellogg, 114 C. A. 2d 640, 251 P. 2d 40 49–50

Cavalieri v. Isthmian Lines, 189 F. Supp. 525, 190 F. Supp. 801 60

Chicago, Rock Island & Pac. Rwy. Co. v. United States, 220 F. 2d 939 ..... 19, 33, 34, 35, 36, 54

City of Wabasha v. Southwark, 54 Minn. 79, 55 N. W. 818 49

Colonial Motor Coach Co. v. N.Y.C. R.R. Co., 131 Misc. 901, 228 N.Y.S. 508 43

Crawford v. Pope & Talbot, Inc., 206 F. 2d 784 ..... 25, 60

Crumady v. The J. H. Fisser, 358 U. S. 423 57

Czaplicki v. The Hoegh Silvercloud, 351 U. S. 525 28

Donovan v. Esso Shipping Co., 259 F. 2d 65 ..... 10, 59

Drago v. A/S Inger, 305 F. 2d 139, cert. den. 371 U. S. 925 61

Dunn v. Uvalde Asphalt Paving Co., 175 N. Y. 214 42–43

Employers Mutual Liability Ins. Co. v. DiCesare & Monaco, 9 A. D. 2d 379 43

Fox v. The S.S. Mormacwind, 285 F. 2d 222 10

PAGE

Frankel v. Berman, 10 A. D. 2d 838, revg. 19 Misc. 2d 1074 ..... 29, 43

Gambella v. Johnson & Sons, Inc., 285 App. Div. 580 ..... 29, 43

Gallick v. Baltimore & Ohio Co., 372 U. S. 108 ..... 15, 16, 32

Glenn v. George Rosen & Son, Inc., 12 A. D. 2d 799 44

Globe Indemnity Co. v. Schmitt, 142 Ohio St. 595, 53 N. E. 2d 790 54

Grillea v. United States, 232 F. 2d 919 59

Gulf, Mobile & Ohio Railroad Co. v. Arthur Dixon Transfer Co., 343 Ill. App. 148, 98 N. E. 2d 783 36

Guzman v. Pichirilo, 360 U. S. 698 17

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282 62

Hankinson v. Pennsylvania Railroad Company, 280 F. 2d 249 ..... 33, 37

Hodgson v. Lloyd Brasileiro Patrimonio Nacional, 294 F. 2d 32, cert. den. 369 U. S. 848 11

Hovey v. Elliot, 167 U. S. 409 ..... 21, 22, 23, 26, 31

Howze v. Arrow Transportation Co., 280 F. 2d 403 10

Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Co., Inc., 310 F. 2d 481, cert. granted — U. S. — 61

Keljikian v. Star Brewing Co., 303 Mass. 53 26

Knell v. Feltman, 174 F. 2d 662 ..... 25, 27

Liberty Mutual Ins. Co. v. Colon & Co., 260 N. Y. 305 26

Lilleberg v. Pacific Far East Line Inc., 167 F. Supp. 3 ..... 33, 37

Lilhe v. Thompson, 332 U. S. 459 36

Lyons v. Empressa Hondurena, 273 F. 2d 317 10

McAndrews v. United States Lines, 1959 A.M.C. 1575 41-42

Massa v. C. A. Venezuelan Navigacion, 209 F. Supp. 404 10

PAGE

Michalic v. Cleveland Tankers, Inc., 364 U. S. 325 ... 10

Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N. W. 698 ... 35

Missouri P. R. Co. v. Sonken-Galemba Corp., 220 Mo. App. 462, 274 S. W. 930 ... 54

Morales v. City of Galveston, 370 U. S. 165 ... 10

Morrell v. United States, 297 F. 2d 662 ... 10

Mowbray v. Merryweather [1895], 2 Q. B. 640 ... 61

Mun. Serv. R. E. Co. v. D. B. & M. Holding Corp., 257 N. Y. 423 ... 25, 27

Nashville Bridge Company v. A. B. Burton Company, 299 F. 2d 257 ... 27

Nelson v. Spongberg (Wash.), 318 P. 2d 951 ... 50–51

Oblatore v. United States, 289 F. 2d 400 ... 10

Paliaga v. Luckenbach Steamship Company, 301 F. 2d 403 ... 28

Paragon Oil Co. v. Republic Tankers, S. A., 310 F. 2d 169 ... 29

Paro v. Pennsylvania Railroad Co. (Mo.), 348 S. W. 2d 613 ... 54

Pennsylvania Railroad Co. v. McAllister Brothers, 137 F. Supp. 788, affd. 240 F. 2d 423 ... 35, 40–41

Puddu v. Royal Netherlands Steamship Co., 303 F. 2d 752 ... 10

Rawson v. Calmar S.S. Co., 304 F. 2d 202 ... 10

Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U. S. 124 ... 6, 22, 57, 58

Shannon v. United States, 235 F. 2d 457 ... 34

Simler v. Conner, 372 U. S. 221 ... 32

Sinkler v. Missouri Pacific R.R., 356 U. S. 326 ... 36

Societe Internationale Etc. v. Rogers, 357 U. S. 197 ... 24, 31

PAGE

Staten Island Rapid T. Ry. Co. v. Phoenix Indemnity Co., 281 U. S. 98 ..... 25, 26, 29

The Toledo, 122 F. 2d 255, cert. den. 314 U. S. 689 39

The No. 34, 25 F. 2d 602 61

Treadwell Constr. Co. v. United States, — U. S. —, revg. 299 F. 2d 789 62

Tugboat Indian Co. v. A/S Ivarans Rederi, 344 Pa. 15, 5 A. 2d 453 ..... 33, 44–49

U. S. Wire & Cable Corp. v. Ascher Corp., 167 A. 2d 633, 34 N. J. 121 25

Ward v. Atlantic Coast Line R. Co., 362 U. S. 396 36

Waterman SS Corp. v. Dugan & McNamara, 364 U. S. 421 ..... 34, 35, 57, 58

Weber v. City of New York, 13 A. D. 2d 823 43

Weeks & Son v. Webb, 140 App. Div. 450 ..... 35, 43

West v. United States, 361 U. S. 118 10

West Africa Navigation, Ltd. v. Nacirema Operating Co., 191 F. Supp. 131 42

Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U. S. 567 ..... 11, 32, 57, 58

Weyerhaeuser S.S. Co. v. United States, 372 U. S. 597 ..... 35, 62

White v. Maryland Casualty Co., 139 App. Div. 179 43

Wicker v. Hoppock, 6 Wall. 94, 18 L. Ed. 752 59

Williams v. SS Richard De Larinaga, 287 F. 2d 732 10

Wolff v. Laverne, Inc., 17 A. D. 2d 213, 233 N.Y.S. 2d 55 55–56

Zucchelli v. City Constr. Corp., 4 N. Y. 2d 52 ..... 29, 43

Constitution, Statutes and Rules:

Federal Employees Compensation Act (FECA) 35

Federal Employers Liability Act (FELA) 33, 35, 36

PAGE

Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. 6, 10, 22, 36, 61

Fed. Rules Civ. Proc. Rule 14(a), 28 U.S.C. 2, 4, 5, 7, 11, 12, 19, 20, 21, 22, 23, 24, 25, 28, 29, 32, 56, 58

U.S.C. Const. Amend. 5 (Fifth Amendment) 5, 19, 20, 23, 31, 56

U.S.C. Const. Amend. 7 (Seventh Amendment) 5, 19, 20, 23, 31, 56

Miscellaneous:

Restatement of Contracts, § 334 ill. 5 61

3 Moore 2d ¶ 14.13 pp. 433-434 27

3 Moore 2d ¶ 14.27 [2] p. 502 27

42 C.J.S. Indemnity § 25 38

42 C.J.S. Indemnity § 35a 39

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No. .....

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner* prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit filed on March 1, 1963 insofar as it reversed a final judgment entered in the United States District Court for the Eastern District of New York on May 21, 1962 which dismissed Inger's amended third-party complaint for indemnity against D & K after a re-trial before the Court without a jury, and insofar as it affirmed an intermediate order entered on July 18, 1957, which denied D & K's motion for judgment dismissing said amended third-party complaint upon the basis of a special verdict of the jury rendered at the first trial of the action.

* Petitioner Daniels & Kennedy, Inc., a stevedoring contractor, will hereinafter be called D & K, and respondent A/S Inger, a shipowner, will be called Inger.

Opinions Below

The first District Court's opinion by Bruchhausen, J. (App. pp. 92-103), is reported at 153 F. Supp. 600.

The Second District Court's opinion by Abruzzo, J. (App. pp. 73-91), is unreported.

The Court of Appeals' opinion (App. pp. 65-72) is reported at 314 F. 2d 395.

Jurisdiction

The judgment of the Court of Appeals was entered on March 1, 1963. A timely filed petition for rehearing and rehearing *in banc* was denied on March 28, 1963.

Jurisdiction to review the judgment by writ of certiorari is found in 28 U. S. C. A. § 1254 (1).

Questions Presented for Review

The essential question here is whether the rule of law enunciated below is invalid because it deprives a third-party defendant of its Fifth Amendment due process and Seventh Amendment jury trial rights by depriving it of use of its full rights under Rule 14(a) F. R. C. P.

I

Where a shipowner settles a longshoreman's personal injury suit immediately before the case is to be submitted to the jury on the main claim and the claim over without the approval, consent or participation of the longshoreman's employer, who as a third-party defendant impleaded by the shipowner, has put in issue both the question of the shipowner's liability to the longshoreman and its liability over to the shipowner in the event the shipowner were held liable,

(A) is it the rule of law that as to the employer the issues remain unaltered and that, in order for the shipowner to recover indemnity, it must be determined by the trier of the facts that (1) the shipowner is actually liable to the longshoreman, and (2) if so liable, that the employer's breach of warranty of workmanlike services led to the shipowner being held so liable and that the shipowner's conduct was not of such character as to preclude recovery; and (3) the settlement amount was reasonable in relation to actual damages recoverable for the injuries plaintiff sustained;

or

(B) is it the rule of law that the settlement transforms the issues and the shipowner must recover the amount of the settlement plus its defense expenses from the employer if (1) there was a potentiality of liability because a question of fact existed as to whether the shipowner was liable to plaintiff; (2) the injuries are sufficiently severe, so that by an indiscriminate homogenization of liability evidence and such injury evidence, the settlement even though "plainly erroneous as to liability" is termed "reasonable as to amount"; and (3) the cause of the accident is the sole negligence of the injured longshoreman himself in his careless use of adequate equipment?

Involved in the question thus broadly stated are the following.

(1) Where a shipowner is in fact not liable to an injured longshoreman for injuries he sustained, does the longshoreman's employer have to indemnify the shipowner for monies the shipowner, without the employer's consent, voluntarily pays in settlement of the longshoreman's claim?

(2) Can a shipowner by settling an action at the conclusion of the evidence turn the issues in the case up side down so that the very factual determinations (that it was

not liable to plaintiff and that plaintiff's sole negligence in the careless use of proper equipment was the accident cause) which absolve it from initial liability and consequently require a dismissal of its indemnity claim, serve the diametrically opposed purpose by becoming a basis for awarding indemnity because the stevedoring contractor was the plaintiff's employer?

(3) Does a third-party defendant impleaded under Rule 14(a) F. R. C. P. actually have full rights to question and have determined both plaintiff's claim against defendant and the claim over, or do such rights exist only if their existence suits the purposes of the one who impleads it?

(4) Does the third-party defendant, who answers both the main and third-party complaints, on its own have a due process right to have the trier of the facts make a determination of the foundational issue of whether the defendant is actually liable to the plaintiff which is a prerequisite element of the claim over, regardless of any agreement plaintiff and defendant ~~may make between themselves~~ without the third-party defendant's advice, approval or consent?

(5) Are the employer's Fifth Amendment due process rights to a trial and determination of the issues violated by the rule of law fashioned below which empowers a shipowner, by settling, to take away from the employer its Rule 14(a) right to have the question of initial liability determined and to furthermore so completely alter the issues that indemnity is awarded if plaintiff's negligence is the sole cause of his own accident, with the result that the very factual determinations which exonerate the employer from liability render it liable instead?

(6) Did the Seventh Amendment entitle the employer to judgment upon a jury verdict which determined that the shipowner was not liable to plaintiff on any theory and

that the private settlement the shipowner made with plaintiff was furthermore plainly erroneous as to its liability to plaintiff under all of the testimony in the case?

(7) Are third-party defendants-employers as much entitled to Fifth Amendment due process rights to a complete trial and determination of all issues raised, and Seventh Amendment rights to the results of jury determinations of those issues as are other litigants such as plaintiffs-longshoremen and defendants-third-party plaintiffs-shipowners.

(8) Does the due process clause of the Fifth Amendment guarantee a third-party defendant the right to a trial and determination of such issues as would have exonerated it from liability when the trial commences and does the Seventh Amendment guarantee its rights to a judgment in its favor when the jury determined such issues in a manner which frees it from liability, or do the plaintiff and defendant-third-party plaintiff by privately settling between themselves when the entire action is about to be summed-up to the jury have the power to so alter the issues and reduce the third-party defendant's rights that the very determinations which excuse third-party defendant from liability instead transform into a basis for imposing liability upon the third-party defendant.

(9) Was the attorney who represented the employer throughout the trial required to undertake the representation of the shipowner instead of the employer in order to preserve the employer's already existing rights under Rule 14(a) F.R. C. P. to have the jury determine the question of the shipowner's liability to the plaintiff, and to be exonerated from liability by the jury's verdict that the shipowner was not liable?

(10) Where under the actual facts determined by the triers of the facts the remedy of an injured longshoreman

falls classically and solely within the purview of Sections 4 and 5 of the Longshoremans and Harbor Workers' Compensation Act (33 U. S. C. §§ 904, 905) because his accident was caused solely by his own negligence; is the meaning of *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, to be stretched to the point where the longshoreman's employer must respond in indemnity to a shipowner merely because the shipowner was sued by the injured workman, the shipowner asserted a claim over against the employer, and the shipowner thereafter voluntarily settled the longshoreman's claim against it, without the employer's consent.

II

May an indemnity claim against an employer be predicated upon the negligence of the injured plaintiff, its employee?

(1) Where it is factually determined that the sole cause of an accident is the careless operational negligent act of an injured longshoreman, for which a shipowner is not liable to him, may an indemnity claim against the longshoreman's employer validly rest upon the *respondeat superior* founded theory that such negligence constituted a breach of the employer's warranty where a breach of this type rather than leading to shipowner liability leads in the opposite direction of exculpating the shipowner from liability.

(2) Does a breach of an employer's warranty of a type which does not lead to a shipowner's liability, but leads rather in the opposite direction of exonerating the shipowner from liability, or limiting the shipowner's liability, support a shipowner's indemnity claim against the employer.

Statement of the Case

Plaintiff, Damanti, a longshoreman hatch-boss, employed by D & K, sued Inger, a shipowner, claiming that Inger's negligence and its vessel's unseaworthiness with respect to

a beam jack Inger supplied for his use in moving hatch cover beams, caused him to be injured (1a-42).*

Availing itself of Rule 14(a) F. R. C. P., Inger impleaded D & K,** claiming that its Inger, was not negligent and its vessel not unseaworthy, but, if unseaworthiness there was, it was occasioned by D & K's fault, and demanding judgment over against D & K for any sums that may be adjudged in favor of plaintiff, Damanti, against it, together with costs and attorney's fees in defending against plaintiff's action (10a-13a).

Exercising its rights under Rule 14(a) F. R. C. P., D & K answered both plaintiff's complaint against Inger and Inger's amended third party complaint against it, putting in issue the material allegations in, and requesting dismissal of, both complaints (5a-7a, 14a-16a).

On May 13, 1957, the case in all its aspects came to trial before Judge Bruchhausen, and a jury. On May 22, 1957, the evidence was completed, and the Court ordered summations for the following morning. Throughout the trial, D & K's counsel represented D & K under its rights as a party adverse to both plaintiff and Inger under Rule 14(a) F. R. C. P. and, he, by definition, was identified solely with his client in the eyes of the jury.

From the time suit was commenced against it until May 23, 1957, when counsel were to sum up to the jury on the issues in both the main and third-party actions, Inger kept to itself complete and exclusive control over the conduct of its defenses, and it at no time tendered control of

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* Numerals in parentheses refer to D & K's appendix below and numerals in brackets refer to Inger's appendix below.

** Inger also impleaded the vessel's time charterer, Illinois Atlantic Corp., which throughout the case took a position identical to that which D & K takes here. Inger did not appeal from the dismissal of its third party complaint against Illinois, and, therefore, for practical purposes the charterer exited from the case at that point.

its defense to D & K or requested D & K to come in and defend it. In fact, as is obvious, completely controlling its own defense, it asserted a third-party complaint against D & K.

Very briefly condensed, the evidence at the trial was the following:

Plaintiff, the longshoreman hatch-boss in charge of unloading No. 1 hatch, testified that a beam jack, a piece of portable equipment which Inger supplied for his use in moving hatch beams, was defective, and while he was using it he was caused to be injured [21a, 27a-28a]. Certain of his subordinates also testified that the beam jack was defective [41a, 48a, 51a]. Plaintiff said he was told to use beam jacks in moving beams by a ship's officer. None of his D & K's superiors had given him orders to use them [100a-101a], and it was stipulated that D & K did not inspect the beam jack [44a] (121a). Operations first began on October 27, 1955 [96a, 35a] at 8 A.M. and beam jacks were used for 5 minutes to open up at the main deck level [119a-120a, 222a]. Their next use was when plaintiff met with his accident while using one to open up at the 'tween deck level at 4 P.M. [16a-17a]. The testimony of plaintiff and his witnesses as to the condition of the beam jack and the manner of its use by plaintiff, and the contradictions in such testimony would in and of itself easily enable the trier of the facts to reject plaintiff's claim and determine that the beam jack was not defective but that the sole cause of plaintiff's accident was his negligence in carelessly using it [47a, 86a, 92a-98a, 102a-103a, 117a, 120a, 125a-127a, 131a, 134a-135a; 139a-141a, 144a-145a], [21a-22a].

There was, however, strong additional evidence.

Preliminarily, testimony by Inger's carpenter and two of its officers placed it beyond dispute that Inger undertook to supply beam jacks for longshoremen's use and

to inspect, test and repair them beforehand; that it was Inger's and its officers' and crew's obligation; not D & K's, to see to it that the beam jacks were safe and fit for use when Inger's crew laid them out for the longshoremen (145a-149a, 174a-196a, 199a-202a, 212a-213a, 219a-227a); and that Inger further undertook to check the ship's equipment while unloading work was in progress to see to it that it was safe and to remove any unsafe equipment (166a-167a, 209a, 222a-223a).

Inger's carpenter who had the specific responsibility for their upkeep stated that it was his duty to make a detailed inspection of the jacks and to repair or remove from service any jack which was not perfect or had the slightest thing wrong with it (175a-176a, 182a, 185a-195a, 199a-205a, 219a, 224a-227a), [52a]. He testified to making a detailed and meticulous inspection of the beam jack's parts before he laid it out for use by longshoremen and that the beam jack was in perfect condition on the morning of October 27 (185a-205a, 232a).

Additionally, two ship officers testified that they visually inspected and manually manipulated the beam jack's parts shortly after the accident, and again tested the beam jack in operation by moving beams with it the very next day and that it not only looked to be in perfect condition but performed perfectly when tested (150a-153a, 168a-163a, 170a-171a, 214a-216a). Their testimony was corroborated by an Inger-employed investigator and the log (206a-207a, 223a-224a).

These officers impounded the beam jack immediately after the accident. It remained in the exclusive possession of Inger, its representatives or attorneys from that day forward (108a, 111a, 151a, 160a-161a, 163a-165a, 172a-173a, 215a-219a). During the trial, Inger produced a beam jack in Court which its officer testified was the beam jack in question (Ex. F, 216a-217a, 165a); it was in perfect working order.

It is thus apparent that the veracity of the two groups of witnesses collided head-on-head and in turn, produced a sharply defined question of fact as to whether plaintiff's accident was caused solely by reason of his own negligence in the careless use of the beam jack or whether it was caused by a defect in the beam jack.

If the jury were to find that it was caused solely by plaintiff's negligence or for that matter, even if under a different evidentiary picture, that it was caused by his employer's or fellow employees' negligence in careless use of equipment, the verdict would have had to be for Inger and against plaintiff (*Puddu* v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752; *Rawson* v. *Calmar SS. Co.*, 304 F. 2d 202; *Williams* v. *SS Richard De Larinaga*, 287 F. 2d 732; *Billeci* v. *United States*, 298 F. 2d 703; *Fox* v. *The S. S. Mormacwind*, 285 F. 2d 222; *Morrell* v. *United States*, 297 F. 2d 662; *Oblatore* v. *United States*, 289 F. 2d 400; *Massa* v. *C. A. Venezuelan Navagacion*, 209 F. Supp. 404; *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65), the amended third-party complaint would have to be dismissed as academic (See e.g. *West* v. *United States*, 361 U. S. 118, marginal note 1 at p. 119; *Howe* v. *Arrow Transportation Co.*, 280 F. 2d 403), and plaintiff would be left with his remedy under the Longshoremans and Harbor Workers' Compensation Act (33 U.S.C. § 901 *et seq.*). (*Morales* v. *City of Galveston*, 370 U. S. 165, marginal note 1 at p. 166; *Lyons* v. *Empresa Hondyrena*, 273 F. 2d 317, 319; *Puddu* v. *Royal Netherlands Steamship Co.*, *supra.*)

If, on the other hand, the jury were to find the jack defective and Inger negligent, and/or its vessel unseaworthy (*Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325), it would award recovery to plaintiff against Inger for the amount of his damages as mitigated by his contributory negligence, if any, and it would then proceed to determine the factual questions of whether a breach

by D & K of its warranty of workmanlike services led to Inger's liability, and if so, whether the conduct of Inger was of such nature as to prevent indemnity recovery (*Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563; *Atlantic & Gulf Stevedores Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355; *Hodgson v. Lloyd Brasileiro Patrimonio Nacional*, 294 F. 2d 32, cert. den. 369 U. S. 848). And, there would also arise the sharp question of law as to whether, as the Court subsequently charged at Inger's request, D & K could be charged with an indemnity or even contribution liability under the *respondeat superior* doctrine based upon a breach of warranty deriving solely from plaintiff's negligence, even though Inger would have already recovered for such negligence by having the damages plaintiff recovered against it mitigated.*

With the case in this posture, on summation morning, May 23, 1957, D & K's counsel was summoned into the Court's chambers where Inger's counsel confronted him with a carefully prepared statement to the effect that Inger had privately agreed to settle with plaintiff, and if D & K did not consent to and pay it according to their arrangement, D & K's counsel, as attorney for Inger's "Indemnitor" should step into his shoes and continue with Inger's defense as Inger's counsel from that time forward [53a]. It was an ultimatum, which, at the least, dictated that D & K either waive its personal Rule 14(a) rights to have the question as to whether Inger was initially liable to plaintiff determined (a waiver of D & K's first line of defense) or that D & K assume absolute liability for the settlement they arranged and at the very least for any judgment plaintiff might obtain against Inger (a waiver of D & K's second line of defense).

* See Point II, pages 57-62, *infra*

Giving the ultimatum the broader interpretation which Inger's counsel gave it later, it was a so-called option for D & K to either consent to the settlement and litigate whether Inger was entitled to indemnity solely upon the issue of whether D & K was in some way chargeable with negligence, or in the alternative, if D & K would not consent for its counsel to abandon his defense of D & K and undertake to represent Inger instead, so as to insure that, if Inger were held liable, the same jury would automatically grant recovery over against D & K (60a, 62a).*

No matter what the interpretation, Inger obviously sought to maneuver D & K into the position of abandoning one or the other of its defenses. Inger's counsel was advised that D & K would not consent to the settlement and Inger was warned that, if it nevertheless chose to settle, D & K would still insist that the defenses against liability which it held up to then would not be abandoned, i.e., in order for D & K to ultimately be held liable, it would still have to be established by a determination of the Court and jury exercising their alloted functions that under the law and facts Inger was actually liable to plaintiff, and if so Inger was nevertheless entitled to indemnity, and that the settlement was reasonable (228a-230a); [54a-55a]; for, insofar as D & K was concerned, regardless of whether it was plaintiff who had the burden of proving Inger's initial liability as a pre-requisite to indemnity over, or whether Inger voluntarily undertook to carry that burden for plaintiff; D & K's rights could not be altered. Despite this warning, Inger formally stipulated to a settlement with plaintiff [57a], apparently for the reason that

* The ludicrousness of this so-called option is made apparent by Inger's counsel's answers to inquiries while he was on the stand of the second trial. Even he could not conjure up any interpretation of that offer which would not involve an abandonment by D & K of a right nor could he explain how an orderly trial could have been had if D & K had been foolish enough to abandon its position and step into the trap that was laid (59a-63a, 70a-77a).

it had already privately consummated the settlement but withheld stipulating formally because it wanted to attempt to inveigle or intimidate D & K into abandoning its rights first (59a-60a).

The Court then informed the jury of the settlement and permitted Inger's counsel to testify, over D & K's objection, as to the motivations he claimed induced Inger to settle. Reciting to the jury which itself had heard and seen all the evidence, views of the evidence, of the law, of what the jury could, would and should find, his words were so weighted as to convince the jury that it should find Inger liable to plaintiff, but that such findings should be consonant with Inger's then indemnity theory that it was entitled to indemnity over if it were held liable on unseaworthiness as contrasted to negligence. When taking the stand and in his testimony, he separately categorized the injury and liability questions and related the reasonableness of the $30,000 settlement amount only to plaintiff's injuries (57a-61a), (231a), (54a-55a).

Cross-examination elicited that both he and plaintiff's counsel had been negotiating settlement throughout the case, but that D & K or its counsel had never been informed of, invited to participate or had participated in such negotiation, and that the first time D & K's counsel was apprised of the settlement was by that morning's ultimatum (232a). This was again brought out when he was cross-examined while on the stand at the second trial (56a-59a), and additionally it was shown (56a-77a) that he and plaintiff's counsel had obtained their client's approval to the settlement before the time it was announced to D & K and that they had planned between themselves the tactics they would use upon D & K when they thought the moment opportune to announce their agreement (58a-62a, 64a-66a). He also finally, grudgingly, admitted that a claim over falls if the main claim is not sustained (80a, 233a-234a).

The case then went to the jury for a special verdict upon a charge which stated, at Inger's specific request and excepted to by D & K, that the only D & K's negligence claimed was that of plaintiff himself (247a, 250a-251a).

The interrogatories submitted to the jury for a special verdict and their answers thereto are as follows:

"(A)—Settlement With Plaintiff

1. Was the payment of the shipowner of $30,000 in settlement of plaintiff's claim a reasonable compromise under all of the testimony submitted to you on this trial? Yes.

2. If no, was the payment plainly erroneous? (not answered).

3. If yes, was it plainly erroneous as to amount? No. As to liability? Yes.

4. Is it possible that you would have found the shipowner liable? For negligence? No. For unseaworthiness? No.

5. If answer to 4 is yes, what is the maximum you would have awarded plaintiff for his injuries? (not answered). For negligence? For unseaworthiness?

(B)—Indemnity Claim

1. Were the agents, servants or employees of the stevedoring contractor negligent or careless in any way? Yes.

2. If yes, was such negligence the primary and active cause of plaintiff's injuries? Yes.

3. If yes, what was the nature of such negligence? Carelessness.

4. (a) Was the ship or its equipment unseaworthy at 8:00 o'clock a.m. on October 27, 1955? No.

(b) Was the ship or its equipment unseaworthy at the time of the accident? No.

5. Was the shipowner negligent? No.

6. If yes, what did that negligence consist of? (not answered)."

Read in harmony with one another, with the Court's charge, with the evidence, and even with the opinion testimony of Inger's counsel, the jury's answers demonstrated that it found that the sum of $30,000 was reasonable compensation for plaintiff's injuries if Inger were liable to him ((A)1, (A), 3), but that the beam jack was not defective and therefore Inger was not liable to plaintiff for negligence or unseaworthiness ((B) 4a & b, (B) 5, (A), 4); that plaintiff's injuries were caused solely by reason of his own carelessness in his use of the non-defective jack ((B) 1, (B) 2, (B) 3); and that upon all the evidence it heard in its dual capacity as jury and witness, it was not possible that it would have found Inger liable to plaintiff for either negligence or unseaworthiness ((A) 4); and furthermore on the liability issues, as contrasted to the injury issues, Inger's settlement with plaintiff was plainly erroneous under all of the testimony in the case ((A) 1, (A) 3).

With the rendition of the verdict, D & K in open Court moved for judgment dismissing the amended complaint upon the basis that the findings that Inger was not initially liable to plaintiff upon any theory required such dismissal and for protective purpose moved to set aside findings ((B) 1-(B) 3 (258a-260a)), and Inger moved to set aside parts of the verdict and for a directed verdict (258a-260a). Inger subsequently moved on papers to set aside parts of the verdict and for the Court to substitute instead findings

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* See *Gallick v. Baltimore & Ohio R. Co.*, 372 U. S. 108 at p. 119 and pp. 121-122.

of its own for those of the jury, and for the consequent direction of a verdict for Inger upon the findings so altered. Alternatively, Inger sought a new trial only with respect to those parts of the verdict which it disliked (264a-272a).

The sole complaint that the verdict was a product of jury confusion came from Inger who made it then (266a-267a) and at the appellate level. D & K sought to uphold the verdict at both levels.* Over D & K's opposition (281a-284a), and also that of Illinois (273a-280a), Judge Bruchhausen in an opinion (285a-293a) granted Inger's motion to the extent that a new trial was ordered on all of the issues in the case and denied D & K's motion for judgment upon the verdict (65a-66a). D & K's attempted appeal from the order was dismissed because the order was not final.

By stipulation, the re-trial was without a jury. Re-trial before Judge Abruzzo was at Inger's urging upon a stipulation that the full transcript of the first trial be received in evidence and that the Court make a determination of all issues on the basis of the transcript, along with portions of the deposition of Milton Brown (83a). At the re-trial, counsel for Inger again testified "live" as to "reasonableness" over D & K's objection (48a-55a). Inger did not offer any additional evidence (83a).

Thereafter, in an opinion (82a-100a) which reviewed both groups of witnesses' testimony (86a-91a), Judge Abruzzo, making independent findings of fact, determined that the facts were virtually the same as the jury had found them to be. He found that the beam jack was not defective (91a, 92a), the vessel not unseaworthy (92a), Inger not negligent (92a) and the sole cause of the ac-

* In the Court of Appeals D & K argued (D & K's brief Point IV, pp. 42-46) along the lines subsequently stated in *Gallick, supra*, that there was a duty on the part of the District Court and the Court of Appeals to harmonize interrogatories and that proper harmonization mandated judgment for D & K on the verdict.

cident was plaintiff, Damanti's, negligence in the manner of use in the jack [90a, 92a]. He further found after listening to Inger's counsel's live testimony on "reasonableness" that Inger's settling was not acting within the limits of reason [92a, 98a].* Judge Abruzzo also found that the settlement between Inger and plaintiff was made without D & K's advice or consent and that D & K was not informed of, did not participate in, and was not invited to participate in the settlement conferences between Inger and plaintiff [98a-99a]; and he further commented upon the impossibility of D & K's counsel acceding to Inger's ultimatum and preserving D & K's rights intact at the same time [98a]. He concluded that the amended third-party complaint be dismissed against D & K [100a].

Inger thereafter appealed to the Court of Appeals from that part of the judgment [101a-104a] entered upon Judge Abruzzo's opinion which dismissed its amended third-party complaint against D & K, and solely from that part of Judge Bruchhausen's intermediate order which denied its motion for a directed verdict [103a-104]. D & K cross-appealed (295a-296a) from those parts of Judge Bruchhausen's order which (1) denied D & K's motion for judgment in its favor upon the basis of the jury's special verdict and (2) set aside the special verdict and ordered a new trial.

The Court of Appeals reversed the judgment, and granted judgment in favor of Inger for the amount of the settlement upon the jury verdict at the first trial, and also, in effect, stated Inger was entitled to judgment at the second trial and that Judge Abruzzo's finding that the settlement was not reasonable was clearly erroneous, and

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* This last finding was set aside by the Court of Appeals as clearly erroneous even though the Court heard a live witness on this question. (Cf. *Guzman v. Pichirilo*, 369 U. S. 698.) The other findings were not challenged by the Court of Appeals.

remanded the case to the District Court to fix defense expense recovery.

The Court of Appeals' opinion (App. 65-72), reciting parts of the testimony relating to plaintiff's injuries so as to show their claimed severity, and reciting only that liability *evidence* favorable to plaintiff's case, and then treating *evidence* and *facts* as synonymous, but entirely omitting mention of the *evidence* adduced to show that the beamjack was in perfect condition which ripened into *fact* by the fact trier's determinations, in effect held that Inger was entitled to indemnity as a matter of law because plaintiff's sole negligence in causing his own accident constituted a breach by D & K of its warranty of workmanlike services and consequently that Inger was required to establish additionally only that there was something called a "potential liability" on the part of Inger, the term "potential liability" apparently being defined as some evidence of liability on Inger's part which if accepted by the jury would have made Inger liable; and a reasonable settlement meaning a lumping together of evidence on liability and evidence on damages so that if the damages are severe but the liability evidence is not accepted by the trier of the facts,* a settlement becomes reasonable if it is for some sum a claims adjuster or plaintiff's attorney might view as a reasonable settlement.

The Court of Appeals' opinion has in effect held that if a plaintiff merely makes out a case sufficient to go to a jury, and his injuries are severe, then a settlement between him and the shipowner for what is relatively a lesser amount than he would have been entitled to recover if the shipowner were in fact liable to him, would entitle the shipowner to pursue an indemnity claim successfully by show-

* Here both triers of the facts not only found that Inger was not liable, and that they could not possibly have found it liable, they found that from the liability standpoint the settlement was more than unreasonable, it was plainly erroneous.

ing merely that plaintiff himself was the sole cause of his own accident.

In the process, the Court of Appeals has, by dint of ignoring their existence, stripped D & K of the rights it has under the Fifth and Seventh Constitutional Amendments and Rule 14(a) F. R. C. P., and, even on the claimed over question, it has ignored the principle that to support an indemnity claim, an employer's breach of warranty must be one which leads to shipowner liability rather than in the opposite direction of shipowner non-liability.

The rule of law so announced stems from dictum in a single case (*Chicago, Rock Island & Pac. Railway Co.* v. *U. S.*, 220 F. 2d 939), which is based upon facts and principles irrelevant here, and the offspring which *Chicago, Rock Island & Pac. Railway Co.* sired which are also distinguishable. No other case or authority is cited as supporting the rule of law laid down by the Court which directly conflicts with prior precedents in the same circuit and with the other cases and authorities which have considered the question.

Reasons for Granting the Writ*

This is not a run-of-the-mill shipowner-employer indemnity quarrel, nor an oddity which will seldom recur.

Rather, the precise problem is whether an impleaded employer has in its own name independent rights which the shipowner cannot vitiate at will, or whether an employer is so vassal to a shipowner that the shipowner has the vested power to completely invert the issues in the midst of trial, divest the employer of its then-existing rights, and impose liability upon the employer even though

* Since copies of D & K's petition for rehearing below are being filed with this petition pursuant to Supreme Court Rule 21(4), effort will be made not to duplicate what was said therein.

the facts as determined by two triers of the facts exonerate the employer from such liability.

This petition asks this Court to settle, upon a rule of law which will govern the future pattern of procedure in this type of case, and in fact, all cases where the impleader rule, Rule 14(a) F. R. C. P., is invoked.

Calling for definition, and for that matter preservation and protection, are the Fifth and Seventh Constitutional Amendment and the Rule 14(a) F. R. C. P. personal rights of an impleaded third-party employer who has answered both the main and third-party complaints to have both claims determined by the jury where the shipowner at the eleventh trial hour suddenly and unilaterally settles with plaintiff.

Recently, the Court of Appeals held that shipowner and plaintiff have the power to so mold the issues that, if the shipowner is held liable to plaintiff, an indemnity award against the employer automatically follows (*Capato v. U. S. Lines Co.* (2 Cir.), 311 F. 2d 413). By the holding here it takes a great step beyond. It empowers them to control the result so as to impose indemnity liability upon the employer regardless of what the actual facts are. By the simple device of settling between themselves they are given the power to eliminate the *if*, and upon doing so, the license to reach into the employer's pocket for the amount of their privately agreed to settlement plus the shipowner's defense expenses. Here that has been done even though the actual facts, as determined by two triers of the facts, disclose that the shipowner was not in fact liable to plaintiff and, consequently, there was no liability over, and that the breach of warranty being charged against the employer (plaintiff's sole operational negligence) could not lead to the shipowner's liability.

Sub silento, the opinion below translates Rule 14(a) into a trick rule which empowers a third-party plaintiff

to implead a third-party defendant, and then, at will, take away from it the very constitutional rights, i.e., the right to have in its own name defenses to, and determinations of, both the main and third-party claims, which the Rule by explicit language promises to safeguard. All the more strangely, it bestows upon a third-party plaintiff the authority to exercise this right-destroying power in, of all places, a courtroom during the waning trial moments. Seemingly, the Court has blocked out its inborn basic instincts for due process (cf. *Hoeg* v. *Elliott*, 167 U. S. 401, 17 S. Ct. 841, 843-845).

This Court has never before passed upon the validity of the rule of law enunciated below, and, as is readily perceivable, it is one which reduces a third-party defendant's rights to a parody of such rights, and completely revises Rule 14(a) procedures in this highly litigation-active area of the maritime law.

Of what value to the employer are its rights under Rule 14(a) to try its own name question both plaintiff's claim against the shipowner which is a necessary antecedent to liability over, and also the shipowner's claim over, if the shipowner has the power to wipe out or abridge them by taking away the right to go to and be exonerated by a verdict on either of them? (*Hoeg* v. *Elliott*, *supra*.)

Additionally, the new rule of law proclaimed below is in diametric opposition to the authorities,* which have directly considered the question, including prior precedent emanating out of the Second Circuit itself. It is based solely upon an erroneous interpretation of a single case and cites for added support only that case's offspring which are also clearly distinguishable.**

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* Since these authorities stem from many jurisdictions, they have been quoted at length with usually any comment at pages 48-50 *infra*.

** Analyses of these cases appear at pages 33-38 *infra*.

Whether the new rule of law adopted below meets with constitutional and common sense tests is a vital point of concern here. Trying it against these principles demonstrates that it inflicts upon the employer the very wrongs (the deprivation of due process) which it is the Court's function to prevent (*Hovey v. Elliott, supra*). It is a rule which, for the first time in the history of our jurisprudence, allows two parties by the use of a self-interested Munich-like agreement, made during trial, to divest a third party of its due process and jury trial rights to a determination of the issues; to rewrite a Federal Rule of Civil Procedure (Rule 14(a) F. R. C. P.) and furthermore to so transform the issues that the very determinations which absolve the third party of liability convert into a basis for its liability. Not squaring with the fundamental law—due process—it is wrong.

This petition is lengthy for the reason that no question of law since that considered in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co.*, 350 U. S. 424, has an equivalent far-reaching effect upon both this area of the maritime law, and impleader practice under Rule 14(a).

Bluntly stated, if the rule laid down below is to be the law the following result:

(1) Rule 14(a) F. R. C. P. is judicially amended by including a proviso which empowers a third-party plaintiff to excise from it the provisions purposely built into it for the protection of a third-party defendant's personal constitutional and fundamental law due process and jury trial rights.

(2) Indemnity claims are now a gimmick for foisting upon an employer a liability which it did not even have before Sections 4 and 5 of the Longshoremen and Harbor Workers' Compensation Act (33 U.S.C. §§ 904, 905) made any promises to it; for even before receiving that Act's promises against liability it would not have been directly liable to plaintiff, whose negligent act was the sole cause of his own injury.

(3) The very indemnity principles which this Court laid down in its prior opinions are abrogated, for an indemnity claim against an employer no longer needs to be predicated upon a theory that an employer's substandard performance of its operations led to the shipowner's being held liable and subjected it to damages, since it can now be premised upon a theory that the charged breach is one which leads to a shipowner's non-liability.

These things are self-evident, for, here, the Court of Appeals by holding the employer liable for the amount of a settlement the shipowner effectuated without the employer's participation or consent, and the shipowner's unconcluded defense defense expenses to boot, has in substance declared that a shipowner has the power to turn a case topsy-turvy on summation morning so that the very fact triers' determinations which exonerate the employer from liability (the shipowner non-liability to plaintiff, and plaintiff's negligent operational act as the sole cause of his injury which does not lead to shipowner liability) became instead the basis for saddling the employer with liability.

Having driven employers to the wall by its molding of the substantive law, the Court of Appeals has apparently come to the point of taking away an employer's procedural rights, basic due process, the Fifth and Seventh Amendments and Rule 14(a) notwithstanding, so that shipowners may be assured of recoveries over even when fact triers exonerate employers from liability by their findings.

The Court of Appeals has here gone beyond the point of making an employer a shipowner's insurer. It has so subordinated the employer to the shipowner's will as to make the employer's courtroom rights depend for their existence solely upon whether the shipowner wishes them to exist or not.

The taking of D & K's rights and property without due process and giving them to Inger is more plainly evident here than it was in *Hoeper v. Elliott*, 167 U. S. 409 (see also,

Societe Internationale v. Rogers, 357 U. S. 197), for here D & K was not guilty of contempt, default, or anything of that nature. All D & K did was to insist upon the very rights Rule 14(a) F. R. C. P. gave it—its personal rights to go to the jury on both the main and third-party claims in its own name.

POINT I

The settlement that plaintiff and Inger arranged without D & K's knowledge or participation and consummated without D & K's consent on summation morning did not alter the structure of the case insofar as D & K was concerned. All of the elements which would have had to be established in order to impose ultimate liability upon D & K when the case commenced remained intact. Since, at the outset of the case D & K placed in issue the question of Inger's liability to plaintiff, Inger would first have had to be held liable to the plaintiff before the second phase of the case, the claim over, came into play. The settlement did not do away with the necessity of establishing initial liability as a prerequisite to the claim over. By settling as it did, Inger could not change the issues; it assumed the burden of proving that it was initially liable to plaintiff as a basis for its indemnity claim; and since both triers of the fact determined that Inger was not so liable to plaintiff, D & K was entitled to judgment dismissing the amended third-party complaint upon the basis of the jury's verdict at the first trial and upon the Court's findings at the second.

The rule of law enunciated by the Court of Appeals that Inger did not have to establish to the satisfaction of the trier of the facts that it was actually initially liable runs contrary to the express provisions of Rule 14(a) F. R. C. P. and is repugnant to the Fifth and Seventh Constitutional Amendments in that it deprives D & K of its due process rights to a trial and determi-

nation of the issues raised by the pleadings and the benefit of the jury's determination that the facts were such as to exonerate D & K from liability on the issues as they were properly constituted.

As relevant, Rule 14(a) F. R. C. P. provides:

> "WHEN DEFENDANT MAY BRING IN THIRD PARTY. * * * a defendant may * * * serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. * * * the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff * * *. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. * * *"

Because Inger claimed that D & K was liable over to it if it were held liable to plaintiff, Rule 14(a) permitted Inger to implead D & K so as to simultaneously serve two Inger purposes. First, by giving D & K the right to in its own name contest plaintiff's claim against Inger and to have it fully determined, if there were a fact trier's finding that Inger was liable to plaintiff, D & K would also be bound by it, and Inger would not have to prove all over again in a separate action that it was so liable (*Staten Island Rapid T. Ry. Co.* v. *Phoenix Indemnity Co.*, 281 U. S. 98, 108; *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784; *Man. Serv. R. E. Co.* v. *D. B. & M. Holding Corp.*, 257 N. Y. 423; *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 359; *Knell* v. *Feltman*, 174 F. 2d 662, 664-665; *U. S. Wire & Cable Corp.* v. *Ascher Corp.*, 34 N. J. 421,

167 A. 2d 633; *Keljikian* v. *Star Brewing Co.*, 303 Mass. 53, 54; *Buhl* v. *Viera*, 328 Mass. 201). Second, by at the same time giving D & K the right to contest the claim over, if Inger was found to be initially liable, the same fact trier would go on to decide whether there was liability over, or not. In this way, a multiplicity of actions would be avoided, Inger would minimize its litigation expenses, and there would be a consistency of results because in one trial a single fact trier will have heard and decided all of the issues (*Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, *supra*).

For Rule 14(a) F. R. C. P. to achieve these ends in a manner compatible with due process concepts, D & K had to be given, and was given, complete, independent, personal and irrevocable rights of its own to in its own name contest to final determination all of the issues (*Hovey* v. *Elliott*, 167 U. S. 409) involved in an indemnity claim which are: first, the question of Inger's liability to plaintiff, absent which there will be no basis for the claim over; and second, the question of liability over if Inger were held liable to plaintiff (*Staten Island Rapid T. Ry. Co.* v. *Phoenix Indemnity Co.*, *supra*).*

> "No adjudication can be made that a third party is liable upon a cause of action for indemnification without opportunity afforded to the third party to contest the cause of action asserted against it in regard to every element that enters into that cause of action (*Phoenix Indemnity Co.* v. *Staten Island R. T. Ry. Co.*, 251 N. Y. 127; aff'd, 281 U. S. 98, 108)." *Liberty Mutual Ins. Co.* v. *Colon & Co.*, 260 N. Y. 305, 309.

Thus, what Inger did or failed to do, desired or did not desire to do, with regard to plaintiff's claim against it, and whether or not plaintiff remained in the case or Inger

* D & K protected these rights by answering both plaintiff's complaint against Inger and Inger's third-party complaint.

removed him from it, could not prevent D & K from retaining its independent right to have the question of Inger's liability to plaintiff resolved by the jury. When Inger removed plaintiff from the case, it could not remove with him D & K's right to question whether Inger was in fact liable to him, for it would not square with due process to allow Inger to bind D & K by anything short of a verdict on the initial liability question upon which the claim over depends (3 Moore 2d ¶ 14.13 pp. 433-434, ¶ 14.27 [2] p. 502; *Min. Serv. R. E. Co. v. D. B. & M. Holding Corp., supra; Knell v. Feltman, supra; American Export Lines v. Reed*, 262 F. 2d 122, 125; *Nashville Bridge Company v. A. B. Burton Company*, 299 F. 2d 257, 259).

For example, 3 Moore 2d ¶ 14.13 states at pages 433-434:

> "Rule 14(a) still provides that 'The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim.' This sentence, the Advisory Committee stated, 'protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action.' The Preliminary Draft of 1936 gave only a restricted right; it provided that with leave of Court the third-party defendant may assert any defenses of the third-party plaintiff to the plaintiff's claim which the third-party plaintiff is, to the prejudice of the third-party defendant, neglecting to assert. But the Rule as promulgated and as it now stands is preferable, since if it did not give an absolute right to present defense to the plaintiff's claim it might be a violation of due process to make the adjudication binding on the third-party defendant."

As was stated concisely in *Knell v. Feltman*, 174 F. 2d 662 at 664-665:

> "Knell was under the compulsion of that part of Rule 14(a) which is that one so situated 'shall make

his defenses to the third-party plaintiff's claim as provided in Rule 12 * * *." Moreover, Knell could have asserted, under the Rule, any defenses which Feltman had to the Langlands' claim.

* * *

"Knell was bound * * * by the adjudication of Feltman's liability to the Langlands, as under the Rule he had the right to assert against the Langlands any defenses which Feltman had."

The settlement adjudicating nothing and binding no one had to leave D & K's defense to plaintiff's claim against Inger intact. When the jury and the second trial judge adjudicated that Inger was not liable to plaintiff, dismissal of the third-party complaint was mandatory.

Plainly, since either the absence of initial liability by Inger or the absence of liability over if there were initial liability would result in absolving D & K from liability, Rule 14(a) secured to D & K the full personal due process right to have both issues determined by the fact trier regardless of the course Inger chose to pursue for its own self-interests.

Inger was free to go in any direction it pleased, but it could not compel D & K to follow behind or order D & K to go in a direction of Inger's selection. While Inger could not be prevented from entering into a private agreement with plaintiff, that agreement could no more bind D & K or affect its position,* than could some agreement D & K might make with plaintiff or Inger affect the one who was not a consenting party to it. (Cf. *Paliadin v. Lowenbach 88 Co.*, 301 F. 2d 403; *Czaplicki v. The Hough Silvercloud*, 351 U.S. 525.) Fairness, the heart of due process demands that a third-party defendant's rights be given respect equal to that accorded other litigants.

* See the statement by D & K's counsel to Inger's counsel upon being confronted by settlement ultimatum on summation morning (228a-229a).

A third-party plaintiff can range the entire spectrum from offering no defense to plaintiff's claim, to settling, to taking no appeal when one is warranted; and to even conceding liability to plaintiff, but, the point is simply that it cannot thereby bind another, a third-party defendant, or detract one iota from the third-party defendant's right to have both the initial liability and the claim over questions determined (see, e.g., *Paragon Oil Co.* v. *Republic Tinkers, S. A.*, 310 F. 2d 169; *Zucchelli* v. *City Constr. Co.*, 4 N. Y. 2d 52; *Frankel* v. *Berman* (N. Y.), 10 A. D. 2d 838, modg. 19 Misc. 2d 1074; *Gambella* v. *Johnson & Sons, Inc.* (N. Y.), 285 App. Div. 580).

In short, while Inger and plaintiff were free to serve their own ends in settling, they could not by that means deprive the non-participating D & K of its right to exoneration from liability when both fact triers' determinations that Inger was not liable to plaintiff initially took away the foundation upon which the claim over was conditioned. (*Staten Island Rapid T. Ry. Co.* v. *Phoenix Indemnity Co.*, 281 U. S. 98, 108.)

The rule of law espoused below crystallizes into the view that, if it did not serve Inger's purposes for D & K to retain its right to have the initial liability question determined by the jury, it lay within Inger's power to divest D & K of that right. This pronouncement is fundamentally wrong, for it is hostile to Rule 14(a) and repugnant to the basic due process rights of a third-party defendant which the Rule protects. Contrary to the opinion's view, a third-party defendant is not a second class litigant who has no rights but mere conditional privileges which are revocable at the will of the one who impleads it.

True, it lay solely within Inger's power to implead or not to implead D & K, but it is equally true that, once D & K was impleaded, Inger's powers over D & K ended. D & K acquired rights of its own to contest and have determined both whether Inger was liable, and, if so, whether

there was liability over. Inger could not consistent with due process qualify either right because D & K's exercise of both of them did not suit Inger's purposes any more than D & K could deprive Inger of its rights to both defend against plaintiff's claim and prosecute its claim over. Inger's self-interested desire that D & K's rights be narrowed by compelling it to choose between questioning plaintiff's claim or Inger's third-party claim could not destroy D & K's rights to question both claims, to have them both determined, and to be excused from liability by the fact triers' findings that Inger was not liable to plaintiff.

Self-evidently, D & K's insistence upon its own right to have both claims resolved by the jury could not serve as a lever for prying either right away from it. The insistence upon a constitutional right can never serve the reverse purpose of being interpreted as the waiver or forfeiture of such right; and, D & K's counsel was not compelled to indulge in a shoe-exchanging exhibition before the jury, and thereby abandon or weaken one D & K right, in order to preserve the other.

D & K's position on its rights is exemplified in *American Export Lines* v. *Revel*, 262 F. 2d 122, at page 126:

> "The judgment entered in favor of Export (defendant-third-party plaintiff) against the United States as third-party defendant was based on Revel's (plaintiff's) judgment against Export. The net effect of these two judgments was to place the loss on the United States. If on appeal, Revel should fail to hold his recovery against Export, this would automatically relieve the United States from liability. True, on appeal, the United States might escape liability, even if Export failed to upset Revel's award; but the United States was interested in both avenues of escape."

D & K's position has constantly and consistently accorded with these principles. It maintained, and maintains

that the settlement did not change the structure of the case so as to put it in either a more or less advantageous position than it occupied prior to the settlement.*

Status quo of the issues was all D & K insisted upon. Due process entitled it to that.

Giving D & K due process mandated that, before it could be held liable, it was necessary that all of the elements which would have had to be established absent the settlement still had to be established, and that, consequently, Inger, by settling and removing plaintiff from the case, assumed plaintiff's burden of proving that it was liable to him just as he had to establish such liability before the settlement. As to D & K, it made no difference which party preceding it in the caption of the case had to carry that burden; but one of them had to carry it before D & K could ultimately be held liable. Since both fact triers determined that the burden was not sustained, no liability should have been imposed upon D & K.

If Rule 14(a) means what it says, and the Fifth and Seventh Constitutional Amendments protect third-party defendants as well as other litigants, D & K's insistence upon its right to have the jury determine whether Inger was in fact liable to plaintiff remained in the case despite the settlement and Inger's pressures upon D & K to waive that right (*Hoeg* v. *Elliott*, 167 U. S. 409; *Société Internationale, Etc.* v. *Rogers*, 357 U. S. 197); and both fact triers' findings as to Inger's non-liability mandated that the third-party complaint be dismissed.

The holding below which empowers Inger to do away with the necessity that it first be found actually liable

* Indeed, if the Court of Appeals were correct in its holding that Inger, by settling, deprived D & K of the ability to retain its Rule 14(a) rights fully intact, Inger's settlement would estop it from further pursuit of its indemnity claim. (*American Surety Co* v. *Ballman*, 115 F. 292.)

as a prerequisite element of the indemnity claim; and then empowers Inger to turn the case topsy-turvy so that the very factual determinations which would exonerate D & K from liability serve instead the opposite purpose of imposing a liability upon D & K, plainly deprives D & K of fundamental law and Fifth Amendment due process, and of that same right as it is incorporated in Rule 14(a).

Merging with the due process deprivation is a divestiture of D & K's right to the benefit of the jury's determination of the issues, for the opinion disregards the jury's findings that the facts were such that they mandated a dismissal of the indemnity claim because its first requisite element, Inger's initial liability, was lacking. In this fashion, the opinion tramples upon D & K's Seventh Amendment rights also. (*See Atlantic & Gulf Stevedores* v. *Ellerman Lines, Ltd., supra; Gallick* v. *Baltimore & Ohio Co., supra; Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co., supra; Simler* v. *Conner*, 372 U. S. 221.)

Here, Inger was purely and simply a volunteer in settling with plaintiff. It was not liable to him and for that matter neither was D & K, for the latter's sole liability to plaintiff was under the Longshoremens Act.* Both Inger and D & K exercised their own free choices, Inger by settling without D & K's consent, and D & K by standing fast and insisting that the issues be determined by the jury. Because the advantage Inger thought it would gain over D & K in the eyes of the jury by settling when and how it did, did not materialize, is no reason for turning the issues upside down so that the factual determinations which absolve D & K of liability serve the opposite purpose of licensing Inger to reach into D & K's pocket for

* D & K upon first hearing Inger's surprise settlement announcement ultimatum immediately made clear its insistence upon retaining its personal rights to have the jury determine both claims, and it at that time cautioned Inger that if it settled it would have to assume plaintiff's burden of establishing its initial liability to him in fact and law as a requisite element of its continuing indemnity claim. (228a-229a) [53a-55a]

reimbursement. By allowing that very thing to be done, the opinion below patently deprives D & K of its rights and property without due process. It is therefore obviously wrong. It appears that the Court of Appeals has here demonstrated that its view of the shipowner-employer relationship is equivalent to that of lord and whipping boy, for it paradoxically makes Inger's ill-advised unilateral settlement operate in such fashion as to strip D & K of its rights and to give Inger a basis for indemnity recovery which it did not have before.

Analyses of the cases cited by the Court of Appeals.

At the outset, it must be noted that in none of the cases relied upon below was there a settlement during trial of an action in which the putative indemnitor was impleaded, and it answered both the complaint and third-party complaint, and the settlement was at a point when the case was shortly to go to the jury on the issues on both claims.

In seeking to support its strange result the opinion below relies exclusively upon *Chicago, Rock Island & Pac. Ry. Co. v. United States* (7 Cir.), 220 F. 2d 939, and cases which follow and are based solely upon it (see, *Hankinson v. Penn. RR. Co.* (3 Cir.), 282 F. 2d 249; *California Stevedore & B. Co. v. Pan-Atlantic SS Co.* (9 Cir.), 291 F. 2d 252; *Lillsberg v. Pacific Far East Lines, Inc.* (N. D. Cal.), 167 F. Supp. 3). No other authorities are relied upon. All other relevant authorities are ignored.

The opinion below, by direct quotation of it, primarily premises itself upon a hyperbolic bit of errant dictum in *Chicago, Rock Island*, which, if read literally, displays a cynical attitude toward a jury's capacity to hear and decide a FELA personal injury case, and, moreover, a contemptuous view of the judicial process' ability to cope with such cases.* In any event, this is not a FELA case.

* *Tugboat Indian v. A. S. Iravani Redfr.*, 344 Pa. 15, 5 A. 2d 153, quoted at pages 44-49, *infra*, discloses the complete fallacy of dictum statement.

and moreover the dictum statement has no relevance here, where on the very day of the settlement, the jury, the most impartial witness to the evidence, demonstrated by verdict that it was not sheer folly to have resisted settlement to the point of verdict.*

Additionally, assuming *arguendo*, that Inger's indemnity claim against D & K was as airtight as the opinion indicates, Inger had nothing to fear from a plaintiff's verdict for it could without any travail automatically pass the verdict over to D & K which unlike the putative indemnitor in the cited case was, as a third-party defendant, in the case, in the courtroom, and before the jury on the issues in the third-party action also. In fact, if here there were automatic liability over, it all the more demonstrates the need to protect D & K's rights to a jury determination as to whether Inger was in fact liable to the plaintiff, for if that premise were correct, permitting Inger to remove the initial liability issue from the case was tantamount to empowering Inger to impose liability upon D & K at will.

Before returning to *Chicago, Rock Island* and its progeny it must be pointed out, that the other cases the Court cites at page 1283 of the slip decision (*Waterman SS Corp.* v. *Dugan & McNamara*, 364 U. S. 421; *Shannon* v. *United States*, 235 F. 2d 457; *American President Lines, Ltd.* v. *Marine Terminals Corp.*, 234 F. 2d 753, cert. den. 352 U. S. 926) in no way support the rule of law enunciated. They stand only for the proposition that a settling party who claims indemnity from another is not precluded from pursuing that claim because it settles. In each one of these cases, while there was a settlement there was unequivocal determination that the shipowner was in fact in

* Reference to the record evidence reviewed in Judge Abruzzo's opinion (App. 75-84) demonstrates that the Court of Appeals in its efforts to bolster its result took a completely one-sided view of the evidence (App. 72) and made such evidence synonymous with "known facts" (App. 71). The facts—i.e., that which both triers of the facts found—were completely to the contrary.

tially liable to plaintiff; and in each case, the Court carefully pointed out that there was in fact such initial liability on the part of the settling shipowner. In fact, in some of them, the Court took special pains to point out that the shipowner was not a volunteer because it was in fact actually liable. (See also, *Pennsylvania RR Co. v. McAllister Bros.* (S.D.N.Y.), 137 F. Supp. 788, aff'd. (2 Cir.) 240 F. 2d 423; *Acc. Tractor & Equipment, Co. v. Olympic Steamship Co.* (9 Cir.), 227 F. 2d 274.)

This is graphically demonstrated by this Court's opinion in *Waterman SS Corp. v. Dugan & McNamara* where it was specifically stated that the indemnity-seeking shipowner pleaded and proved that the vessel was in fact unseaworthy.

The opinion in the mutual fault collision contribution case of *Weyerhaeuser SS Corp. v. United States*, 372 U. S. 597, also makes this clear. There, when this Court used the term "reasonable settlement" it plainly accorded the term its every day meaning. Reasonableness was related only to the damages suffered by the injured person, and was not related to or confused with the liability question.* Moreover, it is apparent that, if, in that case, Weyerhaeuser were found not to have been at fault and the United States or the injured were solely to blame Weyerhaeuser would have been a volunteer in settling, and this Court would not have permitted it to obtain contribution, let alone indemnity, from the United States whose liability to the injured was exclusively under the FELA.

Returning to the distinctions between *Chicago, Rock Island*, and the case at bar. Firstly, there it was specifically indicated (at 220 F. 2d 939) that Chicago, Rock Island was secondarily legally liable to the injured under the FELA by virtue of its status as his employer for passive

* See also *Hooks v. Sears, Roebuck* 140 App. Div. 450; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121, 16 N. W. 698.

negligence while the primarily liable party was the United States, whose employee's active negligence in throwing a postal pouch from one of the employer's passing trains injured the employee who was inspecting its wheels as it passed and who was himself completely free of any negligence. Consequently, the secondarily liable railroad employer was entitled to be reimbursed by the primarily liable United States for the amount paid by the railroad in settling of its employee's FELA claim.* Chicago, Rock Island's analysis of its own authorities (See e.g. *Gulf Mobile & Ohio Railroad Co.* v. *Arthur Dickson Transfer Co.*, 343 Ill. App. 148, 98 N. E. 2d 783) plainly demonstrates that indemnity was allowed because the railroad, FELA employer, was in fact actually legally liable secondarily for passive negligence.

More deeply probed, *Chicago, Rock Island* appears to rest upon subrogation principles whereby the employer railroad which paid its injured employee only for lost wages and for medical expenses incurred was placed in the employee's shoes and subrogated to his rights against the United States to the extent of such payments. Here, subrogation by Inger to plaintiff's rights against D & K would not avail it any. Firstly, plaintiff's rights against D & K are exclusively under the Longshoremen's Act, and, secondly, since plaintiff's own negligence was the cause of his accident, he could not have recovered from D & K even under the law as it existed before the Longshoremen's Act promised D & K freedom from it.

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* As to a railroad's actual initial FELA liability to its employees in such a situation see e.g. *Sinkler* v. *Missouri Pacific R. R.*, 356 U. S. 326; *Ellis* v. *Thompson*, 332 U. S. 450; *Ward* v. *Atlantic Coast Line R. Co.*, 362 U. S. 396; *Carney* v. *Pittsburgh & Lake Erie R. R. Co.*, 13 Cir. 3, 27 963, ——— F. 2d ——— and cases cited therein. But as to a shipowner's non liability where a longshoreman is injured by reason of his own fellow employees or the employer's improper use of proper equipment see e.g. cases collected at page 10, *supra*.

As to *California S & B, supra*, it appears that, there, the claim for indemnity was under the express terms of a written indemnity contract, a situation not existing here, and more important, the stevedoring contractor-employer participated in the settlement and at least impliedly consented to its consummation, thus apparently waiving or being estopped from raising any issue as to the initial liability question. This factual situation is diametrically opposed to that here where D. & K. upon finally being advised about the settlement protested against it and desired a jury determination.

In *Hankinson, supra*, the United States, the indemnitor, not only fully participated in the settlement and consented to its consummation, it also expressly stipulated that the railroad indemnitee was in fact initially liable to the person injured, but later attempted to renege upon its stipulation.

In *Lillebera*, the same factual pattern is evident. A settlement, apparently fully acquiesced in by the employer was thereafter approved by the Court and embodied in a pre-trial order. Additionally the Trial Court found that the shipowner was in fact liable because the vessel was in fact unseaworthy as the result of conditions created by the employer.

Significantly, in none of the cases relied upon below were the settlements made during a trial in which the claimed indemnitor was participating as an impleaded party whose status was fixed in the eyes of the jury. Most certainly, in none of them was the settlement made without the employer's approval at the time the entire case was to go to the jury for verdict.

Having thus inquired into the principles which must serve as the mold for shaping the appropriate rule of law, and having analyzed the authorities relied upon below, we turn to the many authorities which state the rule of law advocated here. They agree with D & K's position through-

out—i.e., Inger's surprise summation morning settlement and maneuvers did not preclude Inger from pursuing its indemnity claim, but in order to prevail on that claim, Inger had the burden of proving that: (1) it was actually liable to plaintiff under the law and facts; (2) if so liable, it was entitled to indemnity from D & K because the latter's breach of warranty led to its being held so liable and it was not itself guilty of such conduct as to preclude indemnity and (3) the amount of the settlement was reasonable in that plaintiff's injuries would have warranted a recovery for the amount of the settlement if there had been liability; and that since both triers of the facts determined that Inger was not liable to plaintiff, it failed to sustain its burden of proof on the first element of its claim and the amended third-party complaint had to be dismissed.

Quotations from the authorities which state the rule of law applicable:

The requisite elements in an indemnity suit are tersely set out in 42 C.J.S. Indemnity § 25 at pages 603-604:

> "*Necessity of compulsory payment.* In order that one seeking indemnity be entitled to recover, he must have sustained an actual legal liability to the injured party; and he cannot recover over an amount which has been wrongfully recovered from him. Thus, while a person who is liable for injuries caused by the negligence or wrongful act of another may adjust and pay the claim therefor and need not wait the result of a suit in order to be entitled to indemnity from the wrongdoer, the amount claimed must be reasonable and just, and the payment must have been made in good faith, after notice to the indemnitor; and a person so paying assumes the risk, in an action against the wrongdoer for indemnity, of being able to prove the actionable facts on which his liability depends as well as the reasonableness of the amount which he pays."

As to the evidence and burden of proof in an action for indemnity, 42 C.J.S. Indemnity § 25a states at page 626:

> "Thus the burden of proof is on indemnitee to prove clearly all the material elements of his cause of action against the indemnitor, including, inter alia, breach of the indemnity contract, the responsibility over of the indemnitor to him, the fact and amount of loss sustained, the facts on which his legal liability to pay the claim existed, as well as the reasonableness of the amount paid, and where judgment has been rendered against the indemnitee in an action which his indemnitor lacked notice, the burden rests on the indemnitee when suing the indemnitor again to establish all of the actionable facts."

There is no question but that before this case the rule of law in the Second Circuit was that advocated by D & K.

In *The Toledo*, 122 F. 2d 255, cert. den. 314 U. S. 689, it was stated at page 257:

> "The theory of the charterer on this claim is that in transshipping the cargo it was mitigating the damages which the cargo owner would have against it; thereby reducing the claim it would have over in indemnity against the respondent. A claim for indemnity, however, requires that an actual liability be sustained by the indemnitee, and if he settles a claim without a determination of the rights in question, he bears the risk of proving an actual liability in the action over for indemnity. *Donald v. Gen.* D.C., E.D. Va., 127 F. 228; *Dunn v. Uvalde Asphalt Paving Co.*, 175 N. Y. 219, 218, 67 N. E. 439; *Colonial Motor Coach Corp. v. New York Central R. R.*, 131 Misc. 891, 901, 228 N. Y. S. 508. In failing to establish a lack of due diligence the charterer failed to establish a right to indemnity based on an actual liability on its part. The court below was clearly correct in denying this claim.

for damages on the ground that the charterer acted as a volunteer."

In *Pennsylvania Railroad Co.* v. *McAllister Brothers*, 137 F. Supp. 788 (S.D.N.Y.), affd. as a "reasoned opinion", 240 F. 2d 423, 424, where Pennsylvania sought indemnity for monies paid to a longshoreman, one Ceci, in settlement of his action against Pennsylvania, Judge Weinfeld stated at page 791:

> "Thus these are the issues to be determined: (1) was Pennsylvania liable to Ceci upon the law and the facts as adduced in the state court action; (2) if so, is Pennsylvania entitled to recover from McAllister as indemnity the amount it paid to Ceci in settlement of its liability; (3) is the dismissal of the state court action as against McAllister, a co-defendant res judicata so as to bar recovery; (4) does the fact that Pennsylvania settled Ceci's claim against it rather than to await a determination by a jury or a Court constitute it a volunteer so as to preclude recovery."

And again at page 795,

> "4. The Defense of Voluntary Payment
>
> The final defense vigorously asserted upon the trial is that Pennsylvania may not recover the sum paid in settlement of Ceci's claim because it was not made under the compulsion of a judgment or with McAllister's consent. It is true that the settlement does not bind the claimed indemnitor nor establish its liability; but equally true it is that the person making the voluntary payment is not deprived of his right to seek enforcement of his claim of indemnity for the amount so paid. All it means is that the indemnitee has assumed the risk of proving that (1) it was liable to the third-party; and (2) the reasonableness of the

settlement. With respect to the first item, I have already found that Ceci fully established his case against Pennsylvania—as to the second, the respondent has conceded that if in fact Pennsylvania were liable the amount paid was reasonable."

In *McAndrews v. United States Lines*, 1959 A.M.C. 1577 (S.D.N.Y. 1958), the Court said:

(1577) "It was duly stipulated herein by Chelsea that the sum of $60,000 was a reasonable settlement to be paid to the plaintiff in the event of liability, and that the sum of $2,250 was a reasonable fee for the attorneys for United States Lines, and that the sum of $1,105.71, payable as disbursement by the attorneys for the said United States Lines, was a reasonable amount. This stipulation, however, was without the concession of any liability or obligation on the part of the defendant United States Lines, to make the said payment to the plaintiff or of liability of Chelsea therefor.

"I find that said sums were reasonable."

"19. United States Lines has not shown by a fair preponderance of the credible evidence that it was liable in any respect, by reason of negligence or unseaworthiness, to the plaintiff Joseph McAndrews, or that the condition of the dunnage on the 'tween deck adjacent to the lip of the coaming or the existence of any cable in the same area was a proximate cause of the plaintiff's injuries."

Then the Court went on to say:

(1579) "A longshoreman may sue a third party tort feasor for his injuries. *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 1947 A.M.C. 349, 1016, and if the facts permit, he may recover from the ship owner for unseaworthiness or for negligence, or both. *Pope*,

of Talbot, Inc. v. Hawn, 346 U. S. 406 (1953), 1954 A.M.C. 1; *see also Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 1956 A.M.C. 9. In such an action, the ship-owner is placed in the position of having to defend itself against the claim of negligence or unseaworthiness. However, if the ship-owner settles its action with the longshoreman and seeks indemnity over from others, it must in effect establish its own negligence or the unseaworthiness of its vessel as a prerequisite to a recovery over on its indemnity claim.

Therefore, since in the case at bar United States Lines voluntarily settled with the plaintiff Joseph McAndrews, it must establish as a prerequisite to recovery against Chelsea the actionable facts showing the liability of United States Lines to plaintiff. *The Toledo* (2 Cir.), 1941 A.M.C. 1219, 122 F. (2d) 255; *Pennsylvania Railroad v. McAllister Brothers Inc.* (S.D.N.Y.), 1956 A.M.C. 707, 137 F. Supp. 788, affirmed (2 Cir.) 1957 A.M.C. 318, 240 F. (2d) 423; *Ryan v. Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 218 (1903). This burden has not been sustained by United States Lines as third-party plaintiff against Chelsea."

See also, *West Africa Navigation Ltd. v. Nacirema Operating Co.* (E. D. Pa.), 191 F. Supp. 131.

New York law is identical. In *Ryan v. Uvalde Asphalt Paving Co.*, 175 N. Y. 214, the Court said at page 218:

> "The contract of indemnity implied by law, in favor of one who is legally liable, for the negligence of another, covers loss or damage, and not mere liability. (Sedgwick on Damages, Sec. 785; *Oceanic S. N. Co. v. Compania T. E.*, 134 N. Y. 461; *Village of Port Jervis v. First Nat. Bank*, 96 N. Y. 550.) On the other hand, such loss or damage may be voluntarily paid by the innocent party who is legally liable without wait-

ing for judgment (Thompson on Negligence, p. 789; *Gray v. Boston Gas Light Co.* 114 Mass. 149, cited with approval in *Oceanic S. N. Co. v. Compania T. E.*, 134 N. Y. 461), but, in that event, he undoubtedly assumes the risk of being able to prove the actionable facts upon which his liability depends as well as the reasonableness of the amount which he pays."

And in *Colonial Motor Coach Corp. v. N.Y.C. R.R. Co.*, 131 Misc. 891, 228 N.Y.S. 508, the Court said:

"(131 Misc. 903) It has, however, been finally determined, and the rule in the State of New York is, that a person entitled to indemnity, where he is liable to be mulcted in damages, may settle the claims and recover over against the indemnitor, subject to the proof (1) of liability and (2) as to the reasonableness of the amount of settlement."

(902) "This wisdom of the rule as established in this State is obvious. The courts favor settlements of negligence actions. By settlements the perils and expense of litigations are avoided, and the burden upon courts already overburdened is relieved by every settlement. No harm can possibly arise to a defendant liable over by reason of such a settlement, because the plaintiff in making the settlement without the consent of his indemnitor defendant is still under the obligation of proving (1) that he was liable, (2) that the settlement was reasonable, and (3) that his liability was of such a character that in spite of it he may recover over against the defendant."

In accord are *Employers Mutual Liab. Ins. Co. v. De Cesare & Monaco*, 9 A D 2d 370; *White v. Maryland Casualty Co.*, 139 App. Div. 179; *Woods & Son v. Webb*, 130 App. Div. 450; *Weber v. City of New York*, 13 A D 2d 823; *Zuchelli v. City Consol. Co.* 4 A D 2d 52, aff'd 286 App. Div. 842; *Gambella v. John A. Johnson & Son, Inc.* 285 App. Div. 580; *Frankel v. Herman*, 10 A D 2d 838.

revg. 19 M. 2d 1074; *Glenn* v. *George Rosen & Son, Inc.*, 12 A D 2d 799.

The law in other jurisdictions is also the same.

Tugboat Indian Co. v. *A/S Ivarans Rederi*, 344 Pa. 15, 5 A. 2d 153, states at 5 A. 2d 154-156:

"Barnes * * * (sustained) severe injuries.

Barnes brought an action in tort for damages * * * against Tugboat Indian Company as the alleged owner and operator of the tugboat * * * Tugboat Indian Company also asked for a nonsuit but the motion was refused. Being apprehensive as to the amount of damages which the jury might award against it, Tugboat Indian Company thereupon settled with Barnes by paying him $2,500, taking from him a release and an assignment of his rights against the S. S. 'Tercero', its owners, underwriters and charterers.

Upon the commencement of the action by Barnes, counsel for Tugboat Indian Company wrote letters to A/S Ivarans Rederi and Moore & McCormack, Inc., demanding that they undertake the defense of the suit, and again wrote to their counsel prior to effecting the settlement with Barnes, giving notice of the proposed payment and expressly reserving right of action by way of subrogation. Tugboat Indian Company then began the present suit in assumpsit against A/S Ivarans Rederi, * * * and Moore & McCormack Co., Inc., to recover the sum of $2,500 paid to Barnes, together with expenses of $1,290.30 incurred in connection with the defense of the Barnes suit. A verdict was rendered by the Jury in favor of plaintiff in the amount of $2,500, the item of expenses having been eliminated by the trial judge. Subsequently the court granted a motion for judgment n. o. v. Plaintiff now appeals for a restoration of the verdict.

[1-4] This is not a suit by one tortfeasor against another for contribution. Neither is it an action based

upon Barnes' assignment of his claim, plaintiff evidently realizing that unliquidated damages in tort cannot be assigned. Patten v. Wilson, 34 Pa. 299; Marsh v. Western New York & Pennsylvania Ry. Co., 204 Pa. 229, 231, 53 A. 1001; Sensenig v. Pennsylvania R. Co., 229 Pa. 168, 78 A. 91; Manganiello v. Lewis, 122 Pa. Super. 435, 186 A. 218. Plaintiff framed its case upon the established doctrine that one who pays under coercion or duress the obligation of another is entitled to restitution from the real debtor. In its statement of claim it alleged that the injuries to Barnes were occasioned solely by reason of the negligence of defendants in the way in which they handled the spring line, and were not caused or contributed to by any fault on the part of plaintiff. The statement of claim further alleged that plaintiff settled with Barnes because 'fearful of the result of continuing the litigation under the circumstances and realizing the possible burden upon its property and business of an adverse verdict and the costs involved in continued litigation and appeal.' Aside from other questions which suggest themselves, it is clear that the facts disclose no coercion within the meaning of the principle upon which plaintiff relies. In order to constitute duress there must be an actual or threatened seizure of a person or his property for the purpose of compelling him to pay money for which he is not liable. Christ Church Hospital v. Philadelphia County, 24 Pa. 229, 231; Lehigh Coal & Navigation Co. v. Brown, 100 Pa. 338, 340; Peebles v. City of Pittsburgh, 401 Pa. 304, 308, 47 Am. Rep. 714; Harvey v. Girard National Bank, 119 Pa. 212, 222, 13 A. 202; De la Cuesta v. Insurance Co. v. North America, 136 Pa. 62, 78, 79, 658, 20 A. 505, 9 L.R.A. 671; Payne v. School District, 168 Pa. 386, 392, 31 A. 1072; Schoenfeld v. City of Bradford, 16 Pa. Super. 165, 169; Carhill Petroleum Co. v. Ennis-Bayard Petroleum Co., 81 Pa. Super. 486; Friedline v. Somerset Borough, 114 Pa. Super. 49, 52, 173 A. 424.

[5, 6] Plaintiff was in no such perilous position. Had it persisted in its defense in the Barnes suit, that it was in no way responsible for the accident, and had the jury rendered a verdict in its favor, it would thus have exonerated itself without the necessity of any payment or further action on its part; on the other hand, had a verdict and judgment been rendered against it, this would have established that it was in fact negligent and was therefore not entitled to the relief which it claims on the ground that defendants alone were at fault. Plaintiff did not, however, choose to abide the issue of the Barnes trial, but settled because it entertained the fear that a just verdict might not be reached, although it would have had the complete protection of judicial review, both by the trial court and on appeal, of any verdict rendered. It is significant that in the present action the jury returned a verdict in plaintiff's favor on the ground that it was not negligent; why should it have been supposed that the jury in the Barnes suit would not have come to the same conclusion? It is true that plaintiff was called upon to decide whether to take the chance of a possibly unfavorable verdict or to settle the claim, but this is a situation inherent in all jury trials, and the necessity of a litigant's exercise of judgment to determine the better policy to pursue is not duress within the meaning of the law. It cannot be said that one is coerced when he has ample opportunity to have his rights litigated and can utilize all the processes of the law to protect himself against an unwarranted demand. If, instead of availing himself of such protection, he chooses to compromise the claim, a payment thus made is not compulsory and does not entitle him to a right of recovery over by way of subrogation or indemnity.

[7] The Pennsylvania cases are unanimous in denying restitution to a person who, contending that an

other has no valid claim against him, nevertheless makes payment solely because of the threat or the institution of litigation to enforce the demand. 'The threat of a distress for rent is not * * * duress, because the party may replevy the goods distrained, and try the question of liability at law: * * *: The threat of legal process is not such duress, for the party may plead and make proof, and show that he is not liable.' Christ Church Hospital v. Philadelphia County, 24 Pa. 229, 231. 'One who is improperly sued for the wrong of another, must secure himself by a defence against that action, and not by subrogation to another.' Borough of West Chester v. Apple, 35 Pa. 284, 285, 78 Am. Dec. 336. 'They [the payments] were not made under any duress of person or goods, or under any impending danger of seizure or sale of property. No warrant or other process had been issued directing a levy upon any property, nor had any right been acquired to issue such process. Before such a right could possibly be obtained the plaintiffs were entitled to a day in court, to be heard in opposition to the claim, to have the adjudication of the regularly constituted courts of the commonwealth, including the court of last resort on writ of error. * * * A payment in such circumstances is a voluntary payment.' Peebles v. City of Pittsburgh, 101 Pa. 304, 308, 47 Am.Rep. 714. 'The coercion which results from a prosecution in court, in good faith, with full right of appeal, does not constitute legal duress.' Blumenthal v. United States, D.C., 4 F.2d 808, 809.: To the same effect: Dittman v. Raule, 134 Pa. 480, 19 A. 676; De la Cuesta v. Insurance Company of North America, 136 Pa. 62, 80, 658, 663, 664, 20 A. 505, 9 L.R.A. 631; Shenango Furnace Co. v. Fairfield Township, 220 Pa. 357, 360, 370, 78 A. 237.

[8 10] Confronted by the weakness of its case, thus indicated, plaintiff seeks refuge in an alternative

theory upon which to base its cause of action, namely, that where a person is secondary liable for damages to an injured party he may recover indemnity from one primarily responsible, and in such a case it is not a prerequisite that he should have defended an action against him to the very end. On the contrary, he may pay or settle the claim voluntarily and recover against the person from whom he is entitled to indemnity, provided he has given proper notice and can establish that the settlement was fair and reasonable. Wise Shoes, Inc. v. Blair, 107 Pa.Super. 473, 479, 164 A. 89. To recover indemnity where there has been such a voluntary payment, however, it must appear that the party paying was himself legally liable and could have been compelled to satisfy the claim. Plaintiff, in order to take advantage of this principle, now contends that it was acting as the servant or agent of the owners and operators of the 'Tercero' and under their orders, that it was liable for the injuries to Barnes, and that, therefore, it is entitled to reimbursement from defendants as its principal in accordance with the rule that where a servant is responsible in damages for injuries to a third person caused, not by the negligent manner of performing an act, but as the result of the act itself as directed by the master, recovery over from the master may be had. Assuming, without deciding, that plaintiff was the servant of defendants, or that even if it was acting in the capacity of an independent contractor the same rule would apply, it is sufficient to point out that the pleadings and all proceedings in the case on the part of plaintiff were diametrically opposed to the contention which it now attempts to assert. In its defense to the Barnes suit, in its statement of claim and in the testimony which it presented in the present action, it alleged and sought vigorously to establish that it was not liable to Barnes, but that it was the crew of

the 'Tercero' who alone caused the accident by their negligence. It presented a point for charge that 'there is no evidence in the case of any negligence on the part of the Tugboat Indian Company.' The learned trial judge instructed the jury that there could be a verdict for plaintiff only if the 'Indian' was blameless in the matter, and the verdict of the jury therefore established that plaintiff was not culpable. It cannot now reverse its position by asserting that it was liable to Barnes, and recover over from defendants by obtaining a reinstatement of the verdict which, the way the case was tried, established exactly the contrary.

Judgment affirmed."

In *City of Waukesha* v. *Southwark*, 54 Minn. 79, 55 N. W. 818, it was said (54 Minn. 87):

"In order to entitle plaintiff to recourse on the defendant for the money which it had paid in settlement of the claim of Schinzel for injuries by reason of the defective sidewalk, it was necessary to establish *First*, that the city was liable to Schinzel by reason of negligence in the performance of its duty to the public to keep its streets in safe condition, and *Second*, that defendant was also liable to Schinzel by reason of his negligence in constructing or maintaining the nuisance in the street which caused the injury."

In *Carpenter Paper Co.* v. *Kelloa*, 114 CA 2d 640, 251 P. 2d 40, the Court stated (114 CA 2d 651):

"The legal principle by which the liability of the appellant to respondent upon this theory is to be tested is, we apprehend, the same as that applicable in the case of an indemnitee who seeks reimbursement from his indemnitor for a payment made by him in-

discharge of a claim indemnified against (42 C.J.S. p. 594 § 20). While such an indemnitee is not bound to submit to suit, he is under the necessity, as a condition of recovery from his indemnitor, of proving that he was liable for the amount thus paid. (13 Cal. Jur. P. 993, § 13, 42 C.J.S. p. 603, § 25; p. 625 § 35.)"

In *Nelson* v. *Spongberg* (Wash.), 318 P. 2d 951, it was said at page 954:

"The trial court recognized the insufficiency of the evidence to establish proximate cause, but concluded that it was not necessary for the plaintiff to establish the fact that the injuries were caused by the negligence of the defendant, since a good faith settlement had been made. The respondent, in support of this conclusion, cites two cases: Lutton Mining Co. v. Louisville & Nashville R. Co., 276 Ky. 321, 123 S.W. 2d 1055, and Chicago, R. I. & P. R. Co. v. Dobry Flour Mills, Inc., 10 Cir., 211 F.2d 785. The court in the first case held that where the indemnitor denied liability under its contract, the indemnitee was justified in making a settlement, and the only question was whether it had acted in good faith. In determining whether the indemnitee had acted in good faith, however, the court undertook a lengthy discussion of the probable liability of both the indemnitee and the indemnitor and concluded that the possibility of a verdict in favor of the indemnitee was very slight and that, in making the payment, the indemnitee was not a volunteer.

In the second case cited, the court recognized the general rule that a mere volunteer in the payment of such a claim cannot successfully maintain an action against another, claimed by such volunteer to be the one liable for the payment, and cited, among other cases, Oregon-Washington R. & Nav. Co. v. Washing-

ton Tire & Rubber Co., 126 Wash. 565, 219 P. 9 as authority for that rule. The court held, however, that under the Oklahoma statute, 15 Okl. St. Ann. § 427, it was not necessary to prove liability where a settlement was made in good faith after notice to the indemnitor.

[7, 8] As recognized in that case, Washington is with the majority of courts which hold that an indemnitee who seeks reimbursement from his indemnitor for a payment made by him in discharge of a claim indemnified against is not bound to submit to suit before paying the claim; but if he pays without such suit, as a condition of recovery from his indemnitor, he is under the necessity of proving that he was liable for the amount thus paid. Oregon-Washington R. & Nav. Co. v. Washington Tire & Rubber Co., supra; Carpenter Paper Co. v. Kellogg, 114 Cal. App. 2d 640, 251 P. 2d 40; Dunn v. Uvalde Asphalt Paving Co., 175 N. Y. 214, 67 N. E. 439; Tugboat Indian Co. v. A/S Ivarians Rederi, 334 Pa. 15, 5 A. 2d 153; 42 C.J.S. Indemnity, § 25, p. 603. Furthermore, even though the liability of the indemnitee has been determined in a suit against him by the claimant, unless the responsibility of the indemnitor was at issue in that suit and the indemnitor was given notice, it is still incumbent upon the indemnitee, in a suit against the indemnitor, to show that his acts were the cause of the damage. Seattle v. John C. Regan & Co., 52 Wash. 262, 100 P. 731."

In *Aetna Freight Lines, Inc.* v. *R. C. Tway Company, Inc.*, Ky., 352 S. W. 2d 372, the Court said at pages 373-374:

"The appellants' contention appears to be that it was sufficient for them to show that there was a reasonable possibility that they would have been held legally liable in the actions against them in Ohio; that the Ohio res ipsa loquitur rule would have permitted

the cases to go to the jury, and therefore they might have been subjected to liability. We think, however, that it was not sufficient for them to show merely a reasonable possibility of their having been held liable, but that they were required to show actual legal liability.

As stated in the opinion on the first appeal of this case, the substantive issues in the case are controlled by the Ohio law. The Ohio rule with respect to recovery of indemnity by a person who has *settled* the claim against him is stated in Globe Indemnity Co. v. Schmidt, 142 Ohio St. 595, 53 N.E.2d 790. One of the stated requirements is that the person seeking indemnity prove 'that he was legally liable to respond' in damages to the person with whom he settled. In support of this rule the Ohio court cites Tugboat Indian Co. v. A/S Ivarans Rederi, 334 Pa. 15, 5 A.2d 153. In that case the plaintiff had settled a tort claim for personal injuries against him, arising out of his operation of a tugboat which was engaged in docking the defendant's steamship, and he sought to recover from the defendant, by way of indemnity, the amount he had paid in the settlement. In the trial of the indemnity suit the plaintiff proved that he had not been negligent in the operation of his tugboat. The court held that in order to obtain indemnity the plaintiff must have proved that he was legally liable to the person with whom he had settled, and since his proof was that he was not liable he could not recover.

Another Ohio case involving the question of proving the legal liability of the person seeking indemnity to the person with whom he settled is American Fidelity & Casualty Co. v. Bennett, Ohio App., 125 N.E.2d 754. There a truck owned by the plaintiff had been involved in a collision which caused injuries to occupants of an automobile. The occupants had brought suit against the truck owner alleging that the

truck had been negligently operated and that it had defective brakes. The truck owner had settled that suit and was seeking indemnity from the defendant, a garageman who had been employed before the accident to repair the brakes on the truck. The ground on which indemnity was sought was that the accident had been caused solely by the defective brakes, for which the garageman was primarily responsible. In upholding the recovery of indemnity the court held that a basis of legal liability of the truck owner to the injured persons had been shown, in that the truck owner was responsible in law to the injured persons for the negligence of the repairman he had employed to fix the brakes. The court said that the fact that the jury in the original damage suit possibly might have found that the accident was caused by negligent operation of the truck rather than by the defective brakes was immaterial, because it was shown on the trial of the indemnity suit that the cause of the accident was in fact the defective condition of the brakes, and under the established law the truck owner was liable to the injured persons for an accident resulting from that cause. The Bennett case does not depart from the rule stated in the Globe Indemnity case, that the person seeking indemnity must prove that he was legally liable to the person with whom he settled.

[2] In the instant case the plaintiffs-appellants alleged and submitted proof that they were not guilty of any negligence in regard to the defective condition of the drawbar. They did not allege that Ohio law imposed upon them an absolute liability regardless of lack of negligence. They based their right of recovery solely on the proposition that even though they were prepared to introduce proof in the damage suit in Ohio showing clearly that they were not negligent, the jury might have found them liable under the *res ipsa loquitur* doctrine. This shows only a *possibility* of

their having been held liable. Under the Ohio law of indemnity that is not enough—they were required to show actual legal liability.

It is our opinion that the trial court correctly gave summary judgment for the defendant because the plaintiffs did not meet the requirement laid down in the opinion on the first appeal of this case that they show a basis for legal liability on their part to the injured claimants with whom they settled."

In *Globe Indemnity Co. v. Schmitt*, 142 Ohio St. 595, 53 N. E. 2d 790, it was said at 53 N. E. 2d [illegible]:

"[6, 7] As a concluding observation it may be appropriate to remark that the right to indemnity against an actual wrongdoer exists whether the one proceeded against in the first instance settled the loss voluntarily or has a judgment recovered against him. In other words, the fact of voluntary payment does not negative the right to indemnity. However, the one seeking indemnity, after making voluntary settlement, must prove that he had given proper and timely notice to the one from whom it is sought, that he was legally liable to respond and that the settlement effected was fair and reasonable. Tugboat Indian Co. v. A/S Svavarans Rederi, 334 Pa. 15, 5 A. 2d 153."

In accord are:

Missouri P. R. Co. v. Soñken-Galemba Corp., 220 Mo. App. 462, 274 S. W. 930;

[illegible] v. *Pennsylvania Railroad Co.* (Mo.), 348 S. W. 2d 613.

If argument is advanced under *Chicago, Rock Island*, *supra*, that settlements are so favored that third parties' rights must be diluted or destroyed to accommodate to them, an opinion by the Appellate Division (1st Dept.)

which has administrative as well as appellate responsibility over all lower courts in calendar congested New York and Bronx counties lays this argument to rest. It said in *Wolff v. Laverne, Inc.*, 47 A D 2d 213, 233 N.Y.S. 2d 553, at 47 A D 2d 214-215:

> "In addition to its other objectives, pretrial affords —by informal discussion with the attorneys and the court—an opportunity for the exploration and consideration of the possibility of settlement. In fact, it is the duty of the Justice to encourage talk of settlement at such pretrial conferences and he can be of immeasurable help in acting as a catalyst in bringing the parties together to a fair settlement. Discussions of settlement can be facilitated through proper exertion of such influence that may naturally flow by virtue of his office. But this does not mean that in intervening to promote a fair settlement, undue pressure or coercive measures should be applied by the Justice on either attorney.
>
> The function of courts is to provide litigants with an opportunity to air their differences at an impartial trial according to law. While the existence of congested calendars calls for attempts to expedite the termination of suits in a minimum of time, these efforts must be consistent with the dictates of due process. Furthermore, they should not serve as a lever to exert undue pressure on litigants to oblige them to settle their controversies without their day in court. The objective should be a settlement voluntarily reached by mutual consent and not one forced on a party to his or his attorney's detriment.
>
> Assuming the power to direct a preference (see *Plachte v. Bancroft Inc.*, 3 A D 2d 437), the circumstances under which it was used in the instant case did not warrant its exercise. To penalize the defendant for not succumbing to the pressure of the Justice presiding at the pretrial to settle the case by offering

an additional $1,000, by ordering a preference of the trial of this action constituted a gross abuse of discretion.

What has been said above regarding the proper scope of a Judge's participation in settlement discussions at pretrial applies equally at other stages of an action where permissible efforts at settlement have proved unsuccessful and the parties insist upon their right to a trial. We view with disfavor all pressure tactics whether directly or obliquely, to coerce settlement by litigants and their counsel. Failure to concur in what the Justice presiding may consider an adequate settlement should not result in an imposition upon a litigant or his counsel, who reject it, of any retributive sanctions not specifically authorized by law. Whether such sanctions assume the form of the direction of unwarranted preferences, of compelling attorneys and litigants unnecessarily to wait in the courtroom while their cases take a desultory course on the calendar, or the exhibition of evident signs of displeasure by the Judge during or after the trial of the case, when reached, or whether such sanctions take any other devious or subtle forms, they merit and will meet with disapproval by this court."

Being repugnant to the due process Fifth and jury trial Seventh Constitution Amendments, to the express provisions of Rule 14(a) F. R. C. P. which protects these rights, and to the authorities which have concerned themselves with the rule of law to be applied, the rule of law enunciated below is manifestly wrong and must be aborted now lest what it condones becomes standard operating procedure.

POINT II

On the second phase of the case, the breach of warranty question, plaintiff's sole negligence in causing his own injury cannot serve as a basis for charging D & K with an indemnity liability on a *respondeat superior* theory because negligence of this type, even if called a breach of D & K's warranty, leads to Inger's non-liability to plaintiff rather than to Inger being held liable.

The principles which here demonstrate that plaintiff's negligence cannot serve as basis for charging D & K with a breach of warranty indemnity liability also in many ways relate back to the previous point and show, by approach from another direction, that the rule of law enunciated below on the initial liability question is in conflict with this Court's prior opinions defining the nature of the employee-shipowner-employer controversy and the principles governing indemnity claims.

The theory of a shipowner's indemnity claim is that a breach of an employer's warranty of workmanlike services created a condition which rendered the vessel unseaworthy or the shipowner negligent or brought into play a condition for which the shipowner was liable for negligence or unseaworthiness (*Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U. S. 124; *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U. S. 563; *Crumady v. The J. H. Fisser*, 358 U. S. 423; *Waterman S.S. Corp. v. Dugan & McNamara*, 364 U. S. 421; *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355).

An indemnity right does not rest merely upon the premise that the employer is in some way chargeable with negli-

gence and that such negligence becomes a breach of warranty. Rather, the essence of such claim is that the shipowner is entitled to indemnity because the employer's sub-standard performance was that which led to the shipowner's liability to the injured plaintiff* or made the shipowner liable to him,** or caused the shipowner to be held liable to him*** and resulted in the shipowner being cast in damages to the injured.****

Thus, a claim over under Rule 14(a) F. R. C. P. is in the hypothetical: it presupposes, on an "if" basis, a shipowner being held liable to plaintiff, and its being cast in damages as a foreseeable consequence of the breach of warranty being charged to the employer.

Here, the sole cause of the accident was plaintiff's operational negligence. Even if, for argument's sake, it were assumed that an employer's warranty to a shipowner is enlarged to include a promise that one of his employees will

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* *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, *ibid.*, at page 567.

** *Waterman S.S. Corp. v. Dugan & McNamara*, *ibid.*, at pages 424-425.

*** *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, *ibid.*, at page 359.

**** *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, *ibid.*, at page 129 note 3; *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, *ibid.*, at page 565; *Waterman S.S. Corp. v. Dugan & McNamara*, *ibid.*, at page 423.

not injure himself by careless use of proper equipment, an injury so caused does not give rise to an indemnity right against the employer, for it could not lead to shipowner liability.

Plainly, a shipowner is not liable to a longshoreman who is injured solely by his own (or even his fellow employees') operational negligence,** and even if it were the longshoreman being 100% negligent, damages would be mitigated to nothing.*** Consequently even if plaintiff's negligence were chargeable to D & K and convertible into a D & K breach of warranty since it could not lead to Inger's liability, (indeed, it did not lead to Inger's liability here),**** and could not serve to cast Inger in damages. It could not therefore in law be a basis for imposing an indemnity liability upon D & K (*Wicker* v. *Hoppock*, 6 Wall. 94, 99, 18 L. Ed. 752, 753).

By settling with plaintiff Inger should not be able to change the law into pseudo-law, as it should not have been enabled to change the facts into pseudo-facts, so as to do away with the requirement that that which is charged against D & K as a breach of warranty be something which would lead to an Inger liability, rather than leading in the opposite direction to Inger's non-liability.

Therefore, the breach that the opinion below charges to D & K under a *respondeat superior* theory being one which does not lead to Inger's liability to plaintiff and does not lead to Inger's being mulct in damages as a consequence,

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* This case does not deal with a situation where an injured workman creates an unseaworthy condition and is subsequently injured thereby (*Grillea* v. *United States*, 232 F. 2d 919; cf. *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 68).

** See cases cited on page 10 *supra*.

*** *Donovan* v. *Esso Shipping Co.*, *supra*.

**** See jury verdict and Judge Abruzzo's findings.

but, in fact, conversely lead to Inger's absolute non-liability to plaintiff, it cannot serve as a basis for charging D & K with a breach of contract liability to Inger.

It is thus apparent that on the second phase of the case the Court below erroneously failed to follow this Court's prior precedents defining the nature of an indemnity claim.

Furthermore, Inger cannot have a greater right to recover over on the "potential liability" theory than it could have had if it were actually liable to plaintiff. If D & K is to be bound by pseudo-facts and unfounded suppositions, so must Inger. (*Crawford* v. *Pope & Talbot, Inc., supra.*)

Even in those cases where a shipowner is in fact negligent or its vessel unseaworthy and an injured workman's negligence concurs therewith in causing his injury, recovery over against the employer by way of indemnity or contribution upon the basis of imputing workman's negligence to the employer and converting it into the employer's breach of warranty is not proper. Simple logic so dictates. Since the shipowner in such a situation recovers indemnity or contribution in full from the injured workman by way of mitigating his damage award against it, even before the threshold of the claim over is reached, the shipowner has been reimbursed in full for all damages related to this type of breach. Allowing a shipowner indemnity or contribution in addition is absurd for several reasons. First, it actually gives the shipowner indemnity or contribution for purely its own derelictions and not for anything attributable to the newly created employer-employee entity. Second, it allows the shipowner a double recovery, once from the employee and once from the employer, for a single wrong. And third, it would probably subject the injured employee to an indemnity claim by the employer so that the parties would go around and around in senseless circles. (Cf. *Cavalieri* v. *Isthmian Lines, Inc.*, 189 F. Supp. 525, 190 F. Supp. 801.)

If examples are considered, the nonsense of such theory becomes apparent. If an employee is 90% negligent and a shipowner 10% negligent, the employer recovers 10% of his total damages from the shipowner. Reversing the negligence percentages gives the employee 90% recovery. If, in addition, the employer becomes liable to the shipowner for indemnity or contribution because of the employee's negligence, the greater the percentage of employee's negligence, the less the employer has to reimburse the shipowner for, and the less the employee is negligent, the more the shipowner is reimbursed for. Thus in reality an employer would not be held liable for the employee's imputed negligence, it would be held liable solely for the shipowner's imputed negligence. Obviously, this does not make good common sense. It therefore cannot make good common law or maritime law.*

Finally, if here Inger had been found actually liable to plaintiff, it would be because it was negligent in knowingly supplying a defective beamjack after actually inspecting it to correct defects in it or to take it out of service, and it would consequently be guilty of breaching a warranty owing to D & K to supply safe and proper equipment.**

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* Parenthetically it may be noted that in the many instances when the employee's net pocket recovery (after fees, expenses, liens etc. are deducted) amounts to less than he would receive in compensation and medical benefits, the employer is liable for the difference (Section 33 Longshoremen's Act, 33 U.S.C. § 933).

** See *Mowbray* v. *Merryweather* [1895], 2 Q.B. 640; *The No. 51*, 25 F. 2d 602; *Boston Woven Hose, &c. Co.* v. *Kendall*, 178 Mass. 232; Restatement of Contracts, § 334, Ill. 5; *Booth S.S. Co.* v. *Meier & Oelhaf Co.*, 262 F. 2d 310; *Cf. Italia Società Per Azioni Di Navigazione* v. *Oregon Stevedoring Co., Inc.*, 310 F. 2d 481, cert. granted U.S. . Here it may not be said as it was in *Dragich* v. *U.S. Inger*, 305 F. 2d 139, 143, certs. den. 371 U.S. 925, that Inger was not a professional supplier of beam jacks, for Inger's own personnel unequivocally acknowledged in their testimony that Inger was not only a professional supplier, it was a professional inspector and repairer also.

Even if the theory advocated by Inger below that plaintiff's negligence in knowingly using it in that condition rendered D & K, his employer, negligent also, Inger at best would be entitled to contribution rather than indemnity. This is said for it appears that this Court realizing the harshness of rules which would either deny the shipowner any recovery over, or make full recovery over plus defense expenses absolute when both are to blame, is seeking a middle ground by allowing contribution (See, *Treadwell Constr. Co.* v. *United States*, —— U. S. ——, revg. 299 F. 2d 789 and *Weyerhaeuser S.S. Co.* v. *United States*, 372 U. S. 597, apparently forecasting the overruling of *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282).

Therefore, since the most Inger could have recovered over if it were held actually liable to plaintiff would be contribution, without defense expenses, it could not in any event be entitled to more on its "potentiality of liability" theory, and, since the recovery-over claim premises itself on plaintiff's negligence, Inger would not have been entitled to any recovery over if actually liable to plaintiff because the mitigation of plaintiff's damages would already have been D & K's contribution. Inger can have no greater right under the potential liability theory.

In the final analysis, the conceptual flaws in the Court of Appeals' opinion which lead to its awarding recovery over for indemnity and defense expenses as a matter of law demonstrate the need for review here.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

May 15, 1963.

Respectfully submitted,

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RAYMOND C. GREEN,
HARRY SCHECHTER,
HAROLD KLEIN,
on the Petition.

Opinion of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND DISTRICT

No. 214—October Term, 1962

(Argued January 21, 1963 Decided March 1, 1963)

Docket No. 27701

PETER F. DAMANTI,

Plaintiff

v.

A/S INGER,

Defendant Third-Party Plaintiff-Appellant-Cross-Appellee

v.

DANIELS & KENNEDY, INC.,

Third-Party Defendant Appellee-Cross-Appellant

v.

ILLINOIS ATLANTIC CORP.,

Third-Party Defendant-Appellee

Before:

FRIENDLY, SMITH and MARSHALL, *Circuit Judges*.

Appeal in third party proceeding in the admiralty in the Eastern District of New York, from judgment setting

aside verdict on special interrogatories, and granting new trial, and from dismissal of third party complaint and a claim over on a second trial, Walter Bruchhausen and Matthew T. Abruzzo, District Judges.

Reversed and remanded for entry of judgment for third party plaintiff A/S Inger.

MONROE J. CAHN, New York, N. Y. (Pyne, Smith & Wilson, New York, N. Y., on the brief) *for A/S Inger.*

RAYMOND C. GREEN, New York, N. Y. (Joseph M. Soviero, Harry Schechter and Harold Klein, New York, N. Y., on the brief) *for Daniels & Kennedy, Inc.*

DAVID P. H. WATSON, New York, N. Y. (Haight, Gardner, Poor & Havens, and J. Ward O'Neill, New York, N. Y., on the brief) *for Illinois Atlantic Corp.*

SMITH, *Circuit Judge*:

On October 27, 1955, Damanti, a longshoreman in the employ of a stevedore, Daniels & Kennedy, Inc., was injured while moving a hatch cover beam with a beam jack supplied by the ship on defendant A/S Inger's vessel Elin Hope, time chartered to Illinois Atlantic Corp. Damanti brought action in the United States District Court for the Eastern District of New York against Inger alleging negligence and unseaworthiness. Inger brought in as third party defendants Daniels & Kennedy and Illinois Atlantic, each of whom also cross claimed against the other.

The case went to trial on May 13, 1957 before Judge Bruchhausen and a jury. On May 24, 1957, when summations of counsel were about to begin, defendant Inger settled with plaintiff for $30,000, first offering the third party defendants an opportunity to take over the defense, which they declined. Inger's counsel testified as to the reasonableness of the settlement. The claims over were then submitted to the jury on special interrogatories which were answered as follows:

"(A)—Settlement With Plaintiff

1. Was the payment of the shipowner of $30,000 in settlement of plaintiff's claim a reasonable compromise under all of the testimony submitted to you on this trial? Yes.

2. If no, was the payment plainly erroneous? (not answered).

3. If yes, was it plainly erroneous as to amount? No. As to liability? Yes.

4. Is it possible that you would have found the shipowner liable? For negligence? No. For unseaworthiness? No.

5. If answer to 4 is yes, what is the maximum you would have awarded plaintiff for his injuries? (not answered). For negligence? For unseaworthiness?

(B)—Indemnity Claim

1. Were the agents, servants, or employees of the stevedoring contractor negligent or careless in any way? Yes.

2. If yes, was such negligence the primary and active cause of plaintiff's injuries? Yes.

3. If yes, what was the nature of such negligence? Carelessness.

4. (a) Was the ship or its equipment unseaworthy at 8:00 o'clock a. m. on October 27, 1955? No.

(b) Was the ship or its equipment unseaworthy at the time of the accident? No.

5. Was the shipowner negligent? No.

6. If yes, what did that negligence consist of? (not answered)."

On motion (including one in the alternative by Inger) the court set the special verdict aside and ordered a new trial. Thereafter all parties waived a jury and retrial on the claims over was had before Judge Abruzzo on the record of the first trial, again supplemented by testimony of Inger's counsel as to the reasonableness of the settlement.

The Court dismissed Inger's third party complaints against Daniels & Kennedy and Illinois Atlantic, as well as the cross complaints of the latter two parties against each other. Inger appeals from the denial of its motion for a directed verdict against Daniels & Kennedy on the first trial and from the judgment dismissing its complaint against Daniels & Kennedy in the second trial. Daniels & Kennedy appeals from the grant of a new trial at the first trial and from the dismissal of the complaint against Illinois Atlantic in the second trial as a precautionary measure in case the appeal of Inger is successful. Daniels & Kennedy also appeals from the denials of its motions at the first trial for a directed verdict and for judgment on the jury's special verdict. We find error on Inger's appeal in the failure to enter judgment for Inger against Daniels & Kennedy on the special verdict of the jury. While this

disposes of the matter, we would be required if we reached the question also to find error in the dismissal of Inger's claim against Daniels & Kennedy on the second trial. We therefore reverse and remand for judgment in favor of Inger against Daniels & Kennedy. We find no error in dismissal of Daniels & Kennedy's cross-complaint against Illinois Atlantic. No appeal was taken from the dismissal of Inger's claim against Illinois Atlantic.

A ship may recover over against a stevedore for amounts paid in settlement of a personal injury claim if the injury was caused by breach of the stevedore's warranty of workmanlike service. *Waterman SS Corp.* v. *Dugan & McNamara Inc.*, 364 U. S. 421 (1960); *Shannon* v. *United States*, 235 F. 2d 457 (2 Cir. 1956); *American President Lines, Ltd.* v. *Marine Terminals Corp.*, 234 F. 2d 753 (9 Cir. 1956), cert. denied 352 U. S. 926; *Ellcberg* v. *Pacific Far East Line Inc.*, 167 F. Supp. 3 (N.D. Cal. 1958).

The elements the ship must establish to recover indemnity from the stevedore are first that the settlement was reasonable under all the circumstances and second that the stevedore was guilty of a breach of the warranty of workmanlike service and has no defense against the ship's indemnity claim. The ship need not establish that it was in fact liable to the claimant so long as the claimant's injury on the ship and a potential liability on the facts known to the ship are shown to exist, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the ship. "It (RK) was required at that time to use its foresight rather than its hindsight in evaluating the situation relative to its probable liability. Taking into consideration that which we all know, that is, the almost insurmountable difficulties attending the defense by a railroad in an action for damages under the Federal Employer's Liability Act, it cannot be said that the plaintiff made other than a fair and reasonable settlement of its potential

liability. To have resisted settlement to the point of a jury verdict would have been sheer folly under the circumstances." *Chicago, Rock Island & Pac. Ruy. Co.* v. *United States*, 220 F. 2d 939, 941 (7 Cir. 1955) reversing the dismissal of an action for indemnity on a finding that the railroad had not been negligent and therefore was not liable to its employee. *Hankinson* v. *Penn. RR Co.*, 280 F. 2d 249, 252 (3 Cir. 1960); *California S & B Co.* v. *Pan-Atlantic SS Corp.*, 291 F. 2d 252, 254 (9 Cir. 1961); *Lilleberg* v. *Pacific Far East Line Inc.*, *supra*.

There was testimony in the case at bar that the injured longshoreman was 37 years old, with a life expectancy of approximately 34.76 years, earning $6,000 a year as a longshoreman, that he suffered a herniated intervertebral disc at L5-S1 (fifth lumbar vertebra-sacrum) or at L4-L5 (fourth-fifth lumbar vertebrae) and a compressed fracture of L3 (third lumbar vertebra), permanent injuries disabling him from heavy work, reducing his earning capacity by about $4,000 a year. In addition there were fractures of transverse processes at L2, 3 and 4 (second, third and fourth lumbar vertebrae), one of which had failed to reunite. He sought damages in the amount of $100,000.

On the liability of the shipowner, there was evidence that the beam jack was defective, in that it was rusted, pitted, bent and with its beam holding teeth imperfect, that these defects caused it to slip off the beam and cause plaintiff and the jack to fall into the hold. Two apparently workable beam jacks were produced at the trial, but a possible inference from the evidence was that the shipowner had concealed and failed to produce the jack involved in the mishap. There was therefore ample support for the jury's answer that the payment of $30,000 in settlement was a reasonable compromise, even though the jury itself believed that it would have credited the evidence against the ship's liability. The court on both trials appears to have ruled as it did in the belief that the determination of

no liability on the part of the ship bars recovery over. This, as we have seen is erroneous, for potential liability is all that is required. Judge Bruchhausen's decision to grant a new trial was based on an erroneous view that the jury's verdict was the product of confusion. It appears to us, however, perfectly clear and consistent, and the court's contrary conclusion and action in setting it aside based on the erroneous legal premise that Inger must prove that it was liable in fact. His action in so doing is reviewable on the appeal from the judgment on the second trial. 6 Moore, Federal Practice 3896-97. *Pettingill* v. *Fuller*, 107 F. 2d 933 (2 Cir. 1939), cert. denied 309 U. S. 669. The jury's answers are quite consistent with the proper understanding of the rule, for even though it found no liability on the part of Inger, it found in all the circumstances, including testimony as to potential liability, that the settlement was reasonable. On the second trial, Judge Abruzzo found that Inger was not reasonable in making the settlement. To what exent, if at all, the finding may have been influenced by a view that a finding of no liability on the part of the ship precluded recovery over is not clear. A review of the entire record, however, leaves us with the firm conviction that the finding is incorrect. We hold it clearly erroneous. Since the action was tried to the court and the finding was largely based on the record of the first trial, we are free to make a finding on the issue from the same record, *see Gedeman* v. *Anheuser Busch, Inc.*, 299 F. 2d 537, 547 (2 Cir. 1961) and cases cited; *Ezekiel* v. *Volusia SS Co.*, 297 F. 2d 215 (2 Cir. 1961), cert. denied sub nom. *Pinto* v. *States Marine Corp.*, 369 U. S. 843. We hold that the settlement was reasonable in amount.

The other element required for recovery is breach of the stevedore's warranty. Both the jury and Judge Abruzzo found that negligence of the stevedore caused the injury. This was a breach of the warranty of workmanlike service. *Drago* v. *A. S. Inger*, 305 F. 2d 139 (2 Cir. 1962), cert. denied

U. S.—(a case involving the same parties except for a different plaintiff). It is probable that the negligence of the stevedore found by both triers was based solely on the actions of the injured longshoreman. This, however, does not preclude recovery over by the shipowner, but is simply a factor that would reduce the recovery of the injured plaintiff from him, *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406, 408-9, and thus is to be considered only in determining the reasonableness of the settlement.

Inger is entitled to judgment for the amount of the settlement. It is also entitled to reasonable attorneys' fees and expenses in the defense of the action up to the time of the settlement. *Baliaga* v. *Luckenbach SS Co.*, 301 F. 2d 403, 409 (2 Cir. 1962).

The Longshoremen's and Harbor Workers Act, 33 U. S. C. § 901 *et seq.* does not bar recovery over, which is based on damage from breach of the stevedore's warranty, not on the longshoreman's claim against his employer. *Ryan Stevedoring Corp.* v. *Pan-Atlantic SS Corp.*, 350 U. S. 124 (1958).

Here, as in *Drago*, "There is no substance in the appeal by Daniels & Kennedy, Inc., from the dismissal of its cross-claim against Illinois Atlantic Corp." *Drago* v. *A S Inger*, *supra*, at 143.

The judgment is reversed and the cause remanded to the District Court with instructions to enter judgment in favor of A S Inger against Daniels & Kennedy in the amount of the settlement plus reasonable attorneys' fees and expenses incurred in defense of the action up to the time of the settlement. Dismissal of Daniels & Kennedy's cross-claim against Illinois Atlantic Corp. is affirmed.

Opinion of Judge Abruzzo.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

PETER F. DAMANTI,

Plaintiff,

v.

A. S. INGER,

Defendant and
Third-Party Plaintiff,

v.

DANIELS & KENNEDY, INC., and
ILLINOIS ATLANTIC CORP.,

Third-Party Defendants.

Civil Action
No. 16455

May 9, 1962

Pyne, Smith & Wilson, Attorneys for Defendant and Third-Party Plaintiff, A. S. Inger; Monroe A. Cairns of Counsel.

Joseph M. Soviero, Attorney for Third-Party Defendant, Daniels & Kennedy, Inc.; Raymond C. Green, of Counsel; and

Shatzkin & Cooper, attorneys for Daniels & Kennedy; Burton S. Cooper, of Counsel.

Haight, Gardner, Poor & Havens, Attorneys for Third-Party Defendant, Illinois Atlantic Corp.; David B. H. Watson, of Counsel.

Abruzzo, D. J.

This action was instituted by the plaintiff, Peter F. Damanti, a longshoreman employed by Daniels & Kennedy, Inc., to recover $100,000 damages for personal injuries sustained on October 27, 1955, while working on board the Ellx Horf, a vessel owned by the defendant A/S Inger, because of the alleged negligence of the defendant and the alleged unseaworthiness of the vessel. Inger impleaded Daniels & Kennedy, Inc., plaintiff's employer, and Illinois Atlantic Corp., time charterer of the vessel, as third-party defendants, seeking indemnity from either or both to the full extent of its liability to the plaintiff, if any.

Illinois Atlantic was an affiliate of the Daily News Syndicate, Inc., publisher of the New York Daily News, a newspaper. Illinois Atlantic had a contract of affreightment with the Quebec North Shore Paper Company of Baie Comeau, Quebec, Canada, from whom the Daily News was procuring its newsprint. Illinois Atlantic as time charterer of the Ellx Horf provided the transportation facilities for bringing the newsprint from Baie Comeau to the Daily News' dock at the foot of Dykeman Street, Brooklyn. The paper was loaded at Baie Comeau by Quebec North Shore Paper Company and unloaded by Daniels & Kennedy, stevedores and plaintiff's employer, under the terms of a contract with the Daily News.

The gist or theory of plaintiff's action against Inger was that one of the beam jacks supplied and owned by the vessel, and part of the ship's gear or equipment, was defective. Inger's defense was that the beam jack was in good condition before and after the accident and that the plaintiff's injuries resulted from his misuse of the jack.

The action was originally tried before Judge Bruchhausen and a jury, and testimony relating to the cause of the accident and medical testimony pertaining to plaintiff's injuries was adduced. After all parties had rested and,

just prior to summation, Inger's counsel summoned counsel for both third-party defendants into Judge Bruchhausen's chambers. There he advised them for the first time that he had offered to settle the case as between Inger and the plaintiff for $30,000 and offered them the further defense of plaintiff's action. They refused to join in the settlement or to undertake the further defense of the action. Notwithstanding the refusal of the third-party defendants, Inger settled the action with the plaintiff and Inger's counsel then took the stand and explained to the jury his reasons for settling plaintiff's action, testifying that on the evidence adduced the jury could find that the beam jack was defective even though the defendant produced witnesses who testified the jack was in no way defective.

The question of liability over was submitted to the jury by way of special interrogatories prepared by the Court. The questions and the jury's answers are as follows:

SPECIAL VERDICT

(A)—Settlement With Plaintiff

1. Was the payment by the shipowner of $30,000 in settlement of plaintiff's claim a reasonable compromise under all of the testimony submitted to you on this trial? Yes

2. If no, was the payment plainly erroneous? (not answered)

3. If yes, was it plainly erroneous as to amount? No

As to liability? Yes

4. Is it possible that you would have found the shipowner liable?

For negligence? No For unseaworthiness? No

5. If answer to 4 is yes, what is the maximum you would have awarded plaintiff for his injuries? (not answered)

For negligence? For unseaworthiness?

(B)—Indemnity Claim

1. Were the agents, servants or employees of the stevedoring contractor negligent or careless in any way? Yes

2. If yes, was such negligence the primary and active cause of plaintiff's injuries? Yes

3. If yes, what was the nature of such negligence? Carelessness

4. (a) Was the ship or its equipment unseaworthy at 8:00 o'clock a.m. on October 27, 1955? No.

(b) Was the ship or its equipment unseaworthy at the time of the accident? No

5. Was the shipowner negligent? No

6. If yes, what did that negligence consist of? (not answered)

Inger moved to set the verdict aside and its application was granted. Judge Bruchhausen's opinion is reported in 153 Supp. 400.

Judge Bruchhausen in setting aside the jury verdict held that the jury's answers to the questions propounded did not exactly demonstrate that the jury was guided by principle in that it decided that $30,000 was a reasonable compromise but failed to answer the interrogatory as to whether the payment was plainly erroneous, and then determined that the $30,000 was not plainly erroneous as to amount but plainly erroneous as to liability. In his opin-

ion, Judge Bruchhausen said that if not for the settlement the jury could conceivably have awarded the plaintiff a substantial sum of money on the original claim, if that had been left for determination. He held also that the jurors' answers to both parts of question 4, while not conclusive, was an indication as to the jurors' lack of due consideration when added to other inconsistencies. He held further that the general subject of indemnity over was complex and the jury could have been readily confused and that, therefore, a clear and thorough presentation of the matters referred to in the opinion would aid both the Court and a jury in their determination on a retrial of the issue of liability over.

The action based on the third-party claim of liability over was retried to this Court without a jury and it was stipulated that the retrial be based on the testimony of the first trial. Defendant's counsel is also seeking Inger's legal expenses and counsel fees paid in defending the action.

TESTIMONY

The testimony adduced by the plaintiff was that the ELIX HOPE arrived at the Daily News' pier at the foot of Dykeman Street, Brooklyn, New York, and at 8 a.m. on October 27, 1955, longshoremen employed by Daniels & Kennedy boarded the vessel to discharge her cargo of rolls of newsprint. There were six hatches aboard the vessel. Plaintiff was the hatch boss of the gang assigned to the No. 1 hatch. His gang first removed tarpaulins and hatch covers which lay atop five beams covering the hatch on the top deck of the vessel. They then removed the five beams which lay athwartship, side by side, across the hatch. Two beams described as queen beams and which were on the aft end of the hatch, each of which weighed approximately a ton, were first removed by bridles at-

tached to two winches, and the other three described as king beams were removed by the use of two beam jacks supplied by the vessel which the longshoreman gang found in a box at the aft end of hatch No. 1. Each jack was operated by a member of the gang at opposite sides of the hatch. Projections on the jacks which the plaintiff called lugs or lips firmly attached to a flat steel plate which extended from the jack were inserted into two holes on the beam. These two holes were the only place on the beam where the lugs or lips could be inserted. The plaintiff described the operation of the beam jack. The beam jack clamps were attached, locked and tightened; and a longshoreman lifted one side and his partner on the opposite side of the hatch then raised his side. The beams were lifted onto rollers which rolled along the coaming of the hatch and were then stored in the wings of the hatch. Plaintiff and his partner, Intaglia, were the operators of the jacks. They removed the beams atop the hatch on the top deck and then the longshoremen removed rolls of newsprint which lay on top of the beams covering the 'tween deck. After these rolls of newsprint were discharged, plaintiff and Intalgia proceeded to remove the 'tween deck beams in the same manner that they removed the top deck beams. The queen deck beams aft were removed by bridles and the two winches and then the plaintiff and Intaglia commenced removing the three remaining king beams. Plaintiff operated a jack on the port side of the hatch and Intaglia operated a jack on the starboard side.

Plaintiff testified that he inserted the lugs or lips into the beam holes, attached the clamp to the beam, and turned the thumb screw by hand to tighten the clamp as far as the screw would go. After he had it hand-tightened he got an object he used as a chock to further tighten the screw. After tightening it he shook the beam jack as a

test to determine if the clamps were tight, after which Intaglia raised his end about an inch. Plaintiff then picked up the jack handle to raise the beam and, as he did, he and the jack went flying into the hold onto the rolls of newsprint stored there. He fell about eight feet and was injured seriously.

Plaintiff and three members of his gang who testified for him at the trial stated that the beam jack's various parts were pitted and rusty and bent.

Plaintiff on direct examination testified that he did not know how the jacks got into the hold but on cross examination stated that he had his men lower them to the 'tween deck. He claimed that the clamps "seemed kind of short to fit around the beams" (Tr. 76). He also testified (Tr. 147):

> The Witness: I did notice these clamps here were pitted (indicating); sort of bent; and this thumb screw here—(indicating), looked bent to, me also, because it was rusted and very hard to turn the thumb screw.
>
> The handle might have been bent, too.

Plaintiff testified on cross examination that after he attached the clamp under the beam he could not see the bottom of the clamps, but he testified on recross examination that because the coaming at the 'tween deck hatch was only a few inches high, if he had any doubts in his mind as to whether the clamp was fastened to the beam he could, if he so desired, readily determine that by looking under the clamps and could also feel if they were fastened securely.

Intaglia, plaintiff's partner in the raising of the beam, testified that after he had lifted the beam about an inch or two and the plaintiff had raised his end up to the same he felt the beam jack slipped because the plaintiff had "pulled it" (Tr. 223). He picked the jack up but saw

nothing wrong with it. He laid it down and got a better view of the jack and saw that "its teeth" were bent, the metal through which the screw had been run was also bent, and the jack was rusted. He saw the third mate pick up the jack and "walk up the ladder."

Lucci, a member of plaintiff's gang, testified that he was a "header." He described the duty of a "header" as one who knocks down standing roll of newsprint so that pins could be inserted in the rolls to aid in their removal. He stated that he examined the jacks on the top deck prior to their being used and although he was under no obligation to do so he did this on his own accord as a safety precaution. He claimed "that is part of the job" (Tr. 418) and "we always check to make sure" (Tr. 420). He saw that the clamps were bent and rusted and the screw was very bent and hard to turn but he did not advise plaintiff of this. He testified further that at the time of the accident he was two or three feet from the plaintiff and saw the plaintiff connect the jack to the beam, raise the beam about an inch, and then saw him "flying" and fall with the jack into the hold. He testified that the plaintiff connected the beam to the jack in proper "shape" but that he did not flip the lock that locks the jack in place when it is in the socket (Tr. 439).

Agosto who worked as a signalman stationed on the top deck on the starboard or inshore side of the hatch saw both jacks after the accident and, although he had nothing to do with the jacks and it was not his job to inspect them he did, and saw that both were rusty and pitted and bent.

The testimony of Olson, the ship's carpenter, adduced on behalf of the defendant and third party plaintiff, Inger, was to the effect that it was his duty to take care of the Elin Hope's gear and equipment, but it was also the duty of the second and third mate together with one of the crewmen to see that the necessary equipment for unloading

was available and in good order and that two beam jacks were placed at each hatch. The carpenter testified that he always inspected, oiled, and greased the beam jacks before the vessel arrived in port in New York or Canada and, if necessary, he would repair the jacks and straighten the clamps. He described the manner in which he oiled or greased the jack by unscrewing a pin on the top of the jack and inserting oil and then screwing the pin back on again. He oiled all movable parts so that they would not rust. He moved the clamps up and down on the axle of the roller and then put the jacks in a case and put a case at each side of a hatch. He did this operation while the vessel was enroute from Quebec to Brooklyn.

The third mate Viken testified that he was informed of the accident to the plaintiff by the chief mate. He went to the No. 1 hatch and removed the jack which was laying on the port side of the hatch coaming just about where the third beam would be. He examined the jack on the deck and found the clamps in good condition and the screw moved easily. They were not pitted nor bent but were a little rusty, but this did not interfere with the operation of the jack. He brought the jack to the chief mate and they proceeded to the forecastle and placed it in a locker. The following day he removed it from the locker and brought it to the 'tween deck where he and the chief mate in the presence of one Daly, an independent marine investigator, examined and tested the jack. The third mate and the chief mate raised and lowered the beam, moved it back and forward, and the jack did not slip. He then put two paint marks on the jack where plaintiff had used and stored it in a locker. About a year later in the summer of 1956, he gave it to a man, who was not identified, who took it away. A jack was introduced and admitted in evidence at the first trial (Ex. F) but neither the third mate nor the chief mate could definitely identify it as being the one used by the plaintiff. Both stated that they were of the

opinion that it looked the same although there were no paint marks or paint strokes on it.

Krossoy, the chief mate, and Daly corroborated the third mate's testimony that there was nothing wrong with the jack and that on the day following the accident it worked properly.

None of the four witnesses who testified on behalf of Inger witnessed the accident. Inger's counsel cross-examined the witnesses called by the plaintiff who were his co-workers, vigorously, attempting as was his right to attack their credibility and reliability.

LIABILITY OF DANIELS & KENNEDY, IF ANY

Based upon this evidence, the Court now sitting both as judge and jury must make its own independent findings of fact. The Court finds that this accident occurred solely by reason of the carelessness and negligence of the plaintiff, a foreman and an experienced longshoreman. The evidence adduced by the ship, Inger, conclusively proves that there was no defect whatsoever in this jack. Portions of plaintiff's testimony tend to sustain this conclusion. It is difficult to believe that if this jack was defective plaintiff would not have called this to the attention of a member of the vessel's crew.

Intaglia, a witness for the plaintiff, testified that the jack seemed to slip because the plaintiff had "pulled it" (Tr. 223). Lucci, another member of the longshore gang, testified that he saw the clamps and they looked bent and rusted and the screw was bent and hard to turn, yet it is difficult to understand why he made no mention of this condition to the plaintiff. He testified further that he saw the plaintiff connect the beam to the jack but that plaintiff did not flip the lock that locks the jack in place when it is in the socket (Tr. 439).

Inger, in its brief, curiously enough now depends upon the evidence of these longshore witnesses as a basis for

recovery. Its contention is that a jury could conceivably find a verdict in favor of the plaintiff and the evidence would have justified such a verdict. It goes further and states in its brief that it does not think that any jury would have believed the ship's witnesses. In its brief before this Court, Inger states (p. 24):

> It requires no discussion to convince that upon that evidence the jury could have found "with reason" that the beam jack was patently defective, that the accident was caused by the defects, that such defects rendered the vessel unseaworthy, and that by reason thereof Inger was liable to plaintiff (Michalic v. Cleveland Tankers, 364 U.S. 325; Calabritto v. N.Y. & N.H.R.R. Co., 2 Cir., 287 F.2d 394, 395).

What the jury could have found is negated by the fact that the jury before Judge Bruchhausen did not find any condition of unseaworthiness nor did it find the ship negligent. This Court is mindful that it must make its own independent findings based upon the record, regardless of any of the jury's answers to the interrogatories propounded by Judge Bruchhausen.

The Court, therefore, makes the following findings of fact:

1. That there was no defect in the jack and thus no negligence on the part of the ship.

2. That the ship was not unseaworthy.

3. That the accident was caused by the plaintiff's sole negligence, evidenced by the fact that he used the beam jack on the top deck on the very day of the accident and made no complaint as to the manner in which it worked. This Court finds that the accident was caused by reason of the jack slipping because plaintiff "pulled it" after connecting the clamps to the beam and failed to "flip the

lock that locks the jack in place when it is in the socket." The Court also finds that the plaintiff did not tighten the clamps properly.

4. That Inger did not act within the limits of reason in compromising the plaintiff's claim.

The findings now made by this Court preclude any recovery by Inger over as against Daniels & Kennedy.

In *Puddu* v. *Royal Netherlands*, decided January 3, 1962, rehearing denied, February 20, 1962, the Court of Appeals for the Second Circuit affirmed the trial court. Four members of a stevedoring gang were injured while loading refrigerator cargo into a reefer hatch when one of the booms with which they were working buckled and broke. Puddu sued the defendant for negligence. An action instituted by another longshoreman was tried by Judge Conger and a jury. Puddu and a fellow longshoreman in a companion case stipulated that their case be tried by the same judge without a jury on the testimony adduced before the jury. The major issue before the jury was the cause of the buckling of a boom. Answering interrogatories propounded by the Court, the jury found that the boom was not defective and that the boom was caused to buckle by reason of the negligent conduct of the members of the stevedoring gang in failing to properly handle the ship's gear. Judge Conger in his unreported opinion (S.D.N.Y. Index No. Civ 151-46), in finding that there was no negligence on the part of the defendant and that the vessel was not unseaworthy, affirmatively stated that he followed the jury and adopted the findings which were found on the special questions given to the jury.

In *Ezekiel* v. *Volusia Steamship Co.*, 297 F. 2d 245, (C.A. 2d), decided December 15, 1961, a seaman was injured while chipping rust aboard a vessel. The plaintiff's evidence on the issue of liability consisted of his own deposition and the testimony of an expert witness. His version

of the accident was that he was not wearing goggles while chipping rust with a hammer on a particular portion of the vessel. He had none and had requested them from the boatswain, who kept them, before starting work but the boatswain claimed to have no more. He was unable to recall the name of the boatswain although he had been on the ship for almost a year. The defendant introduced the deposition of the vessel's chief officer, one Bodden, in which he testified that the deck crew, including the plaintiff, had each been given a pair of goggles and were informed that if the goggles should be lost or damaged, that it was their duty to report this in order for replacement by a new pair; that a notice was posted to this effect and that replacements were to be obtained from the chief officer; that he kept six pairs of spare goggles in his office and that it was the custom for the crew to come to him for supplies but that the plaintiff never sought replacement for his goggles. The chief officer also testified that on two previous occasions he saw the plaintiff chipping rust with goggles around the neck but not on the eyes and remonstrated with him, and that after the accident he asked the plaintiff whether he had worn his goggles and that the plaintiff answered "no," and when asked why, he did not reply. The trial court found for the defendant. The trial court found that goggles had been issued to plaintiff and that replacements were available. The Court of Appeals said (p. 216):

> Reading the findings together as we must, the last quoted finding means at least that the judge had determined, as he was amply warranted in doing, that goggles had been issued to plaintiff, that plaintiff had been instructed to come to the chief officer for a replacement if they were lost or damaged, and that replacements were available. It could mean also that the judge completely discredited plaintiff's story about the unsuccessful request to the anonymous boatswain.

or even that the judge thought plaintiff had the goggles with him but failed to put them on, as, according to Bodden, he had failed twice before. The judge would have been entitled to come to any of these conclusions although plaintiff was not before him, in view of the contradiction between plaintiff's and Bodden's versions of the goggle situation; see *Nolan v. Buffalo Ins. Co.*, 181 F. 2d 735, 738 (8 Cir., 1950). * * *

In *McAndrews v. United States Lines Co.* (S.D.N.Y., 1959 A.M.C. 1575, the Court said (p. 1579):

> However, if the ship-owner settles its action with the longshoreman and seeks indemnity over from others, it must in effect establish its own negligence or the unseaworthiness of its vessel as a prerequisite to a recovery over on its indemnity claim.
>
> Therefore, since in the case at bar United States Lines voluntarily settled with the plaintiff Joseph McAndrews, it must establish as a prerequisite to recovery against Chelsea the actionable facts showing the liability of United States Lines to plaintiff. *The Toledo* (2 Cir.), 1941 A.M.C. 1219, 122 F. (2d) 255; *Pennsylvania Railroad vs. McAllister Brothers, Inc.* (S.D.N.Y.), 1956 A.M.C. 707, 137 F. Supp. 788, affirmed (2 Cir.), 1957 A.M.C. 318, 240 F. (2d) 427; *Dunn vs. Cyalac Asphalt Paving Co.*, 175 N. Y. 214, 218 (1903). This burden has not been sustained by United States Lines as third party plaintiff against Chelsea.

In *Paliaga v. Luckenbach Steamship Co. v. Turner & Blanchard, Inc.* (C.A. 2d), decided March 22, 1962, the opinion reads as follows (pp. 1375-76):

> In cases in which the main action has been so settled, it is of course incumbent upon the court which enter-

tains the claim for indemnity to determine before requiring the stevedore to indemnify the shipowner whether it was reasonable for the shipowner to have entered into the settlement. *Chicago, R. I. & Pac. Ry. v. United States*, 220 F. 2d 939 (7 Cir. 1955); *see Lillebera v. Pacific Far East Line, Inc., supra.*

See also, *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U. S. 563; *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124.

Liability of Illinois Atlantic, if any

Regarding the liability of the charterer, if any, the precise situation in the case at bar was raised in *Drago v. A/S Ingrid*, 194 F. Supp. 398 (E.D.N.Y. 1961). With the exception of the plaintiff all the parties to the instant action were involved in *Drago*. Daniels & Kennedy was the stevedoring company, Illinois Atlantic the charterer, the Daily News the consignee of the paper shipped from Canada, and Illinois Atlantic's responsibility under an identical charter agreement was litigated.

The *Drago* case was tried in two parts: first, the issue of fact as between the injured plaintiff and the ship was tried and the jury found in favor of Drago because of the negligence of Ingrid. It found further that the plaintiff was guilty of contributory negligence to the extent of 75 per cent. After the resolution of the verdict, the Court explored the theory of warranty of workmanlike service between Daniels & Kennedy and the ship and between Illinois Atlantic and the ship.

The Court after due deliberation held that Illinois Atlantic was not liable to Ingrid under the terms of the charter agreement. This Court agrees with the conclusion reached by my colleague.

There is an important element of difference between the *Drago* case and the instant case. In *Drago*, the ship was

held 25 per cent negligent, whereas, in the instant case, there is a finding that the ship was in no wise negligent.

Particular attention might be called to the time charter in question, a standard form which has been widely used for years. The officers and members of the crew of the vessel remained in the employ of the owner, and the responsibility for the maintenance and upkeep of the vessel and her equipment remained in the hands of the vessel and her equipment remained in the hands of the owners. As stated in paragraph 26 of the charter at line 170:

> Nothing herein stated is to be construed as a demise of the vessel to the time charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters same as when trading for their own account.

In paragraph 1 of the time charter, at lines 37 and 38, it is stated that the owners shall "maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service."

Again, at paragraph 22 of the time charter, lines 140 and 141:

> Owners shall maintain the gear of the vessel as fitted, providing gear (for all derricks) capable of handling lifts up to three tons, also providing ropes, falls, slings and blocks.

Another case involving the same charterer and stevedore and the identical time charter was tried before another one of my colleagues in this Court in December, 1957, *Maccarone* v. *A. S. Inger* v. *Daniels & Kennedy, Inc.*, and *Illinois Atlantic Corp.* The plaintiff was injured as a result of a dangerous and defective condition of one of the ship's winches. Third-party complaints were served on Daniels & Kennedy and Illinois Atlantic seeking the same

type of indemnity as is presently before this Court in the instant case. At the close of the case Illinois moved for a directed verdict on the third-party complaint and the motion was granted. An appeal from the ruling that Inger had no right to indemnity from Illinois Atlantic was subsequently discontinued by Inger.

Inger raises the issue of the refusal of the third-party defendants to take over the defense of this action. After the refusal the attorney for Inger took the stand and testified before the jury as to the reasons that motivated him to compromise with the plaintiff. His testimony was to the effect that the jury might not have believed the witnesses he called and could well have predicated a verdict on the evidence of the plaintiff's witnesses. Counsel for Inger, by his testimony, shed doubt with respect to the veracity of his own witnesses and that alone might have effectively given credence to the evidence given by plaintiff's witnesses. Yet, in spite of his testimony the jury held the ship not negligent nor the ship unseaworthy.

The two third-party defendants at that point were put in the position of having but two alternatives, either agree to the compromise which would then make them liable for the settlement, or defend the main action. If they chose to defend and the jury found the ship liable, these same attorneys would then have the burden of convincing the jury that neither of the third party defendants was liable to the ship. On the one hand they would be defending the ship and on the other hand they would be defending themselves against the ship. This Court cannot see how counsel for the third-party defendants under these conditions could possibly assume this dual role.

With respect to the settlement itself, this Court believes it was inadvisable to compromise with the plaintiff. The believable evidence in the case at the moment of settlement was overwhelmingly in favor of the ship and in view of the testimony the settlement was unreasonable.

Opinion of Judge Abruzzo.

Exploring the evidence with respect to the settlement, it was made by the ship without the advice or consent of either of the third-party defendants. Of utmost pertinence, the record indicates there were many conferences between the attorney for Inger and the plaintiff's attorney while the trial was in progress. The attorneys for the two third-party defendants were not informed of these conferences, nor did they participate in any of them, nor were they invited to participate in any of them. Where three possible parties are vitally interested in the outcome of a litigation it is academic their advice and consent to any adjustment should be sought. Counsel for the third-party defendants were entitled to know exactly what the attorney for Inger was doing. While this does not affect the ultimate liability of the parties, it seems to this Court that parties who might ultimately have to bear the full burden of financial responsibility should be consulted constantly. The parties under these favorable conditions might well have adjusted all of their differences at the counsel table.

Regarding the legal fees and disbursements, point VI of Inger's main brief covers the subject in full with one paragraph which reads as follows (p. 37):

POINT VI

JUDGMENT SHOULD BE DIRECTED IN FAVOR OF INGER AGAINST BOTH DEFENDANTS FOR THE AMOUNT OF THE SETTLEMENT $30,000, TOGETHER WITH AN ALLOWANCE FOR REASONABLE COUNSEL FEES AND EXPENSES INCURRED IN THE DEFENSE OF PLAINTIFF'S CLAIM, WITH INTEREST.

If successful on the main issue, Inger's right to recover its reasonable counsel fees and expenses in defending against plaintiff's claim is not disputed, and, therefore, if the court finds in favor of Inger, a date

should be fixed for proof of such damages, as stated upon the trial (s.m.p. 172).

The converse of this, therefore, must be true. This Court has held that the two third-party defendants are not liable over to the ship, therefore, the ship may not recover legal fees or expenses.

CONCLUSIONS OF LAW

1. Inger is not entitled to recover against Daniels & Kennedy on its implied agreement of indemnity.

2. Inger is not entitled to be compensated by Illinois Atlantic as the time charterer.

3. A decree, therefore, must be entered in favor of Daniels & Kennedy and Illinois Atlantic Corp.

4. This opinion may be considered as the findings of fact and conclusions of law.

It is directed that a decree only be submitted to the Court within 10 days from the date of this decision.

MATTHEW T. ABRUZZO,
U. S. D. J.

Opinion by Judge Bruchhausen.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

PETER F. DAMANTI,
Plaintiff,
against
A/S INGER,
Defendant and
Third-Party Plaintiff,
against
DANIELS & KENNEDY, INC., and
ILLINOIS ATLANTIC CORP.,
Third-Party Defendants.

Civil No. 16435

June 27, 1957

Appearances:

PYNE, BRUSH, SMITH & MICHELSEN, Attorneys for Third-Party Plaintiff, Monroe J. Cahn, Esq., Joseph M. Brush, Esq., Of Counsel.

HAIGHT, GARDNER, POOR & HAVENS, Attorneys for Third-Party Defendant, Illinois Atlantic Corp., David P. H. Watson, Esq., Of Counsel.

CHARLES G. TIERNEY, Esq., Attorney for Third-Party Defendant, Daniels & Kennedy, Inc.

BRUCHHAUSEN, D. J.

Defendant and third-party plaintiff, A/S Inger, the shipowner, moves for various forms of relief under Rules

50, 49, 58 and 59 of the Federal Rules of Civil Procedure.

Immediately prior to the time for making summations to the jury in the original action herein, the shipowner settled with the plaintiff stevedore, after inviting impleaded third-party defendants, Illinois Atlantic Corporation, the time charterer and Daniels & Kennedy, Inc., the stevedore, to take over the shipowner's defense.

Additional testimony was given by the shipowner's attorney as to the reason for the settlement of the plaintiff's action. Thereupon the causes of action for indemnity were submitted to the jury upon special interrogatories, a copy of which, with the answers, is annexed.

The cases hold that settlement with a plaintiff does not preclude recovery by the settling indemnitee, who is a passive wrongdoer, against a primarily liable indemnitor. Chicago, Rock Island & Pacific Ry. Co. v. United States, 7 Cir., 220 F. 2d 939; Chicago, Rock Island & Pacific Ry. Co. v. Dobry Flour Mills, 10 Cir., 211 F. 2d 785; Garrity v. Bartolomeo, 2 Cir., 149 F. 2d 604; Dunn v. Uvalde Asphalt Paving Co., 175 N. Y. 214; Cf. American President Lines v. Marine Terminals Corp., 9 Cir., 234 F. 2d 753; Cf. Newport News Shipbuilding & Drydock Co. v. United States, 4 Cir., 226 F. 2d 137; Cf. also, Cardinal v. State, 304 N. Y. 400.

It has been held that a party undertaking to settle a claim must prove that he was liable, that the settlement was reasonable, and that he and the party from whom he seeks indemnity were not joint tort feasors in pari delicto, but that his negligence was passive and secondary, while that of the party from whom indemnity is claimed was primary, active and affirmative. The Toledo, 2 Cir., 122 F. 2d 255; Donald v. Guy, D. C. Va., 127 Fed. 228.

However, there is a distinction between liability in law and liability in fact. The litigant who could correctly determine the latter, whether or not the trial be before a jury, would be clairvoyant.

Opinion by Judge Bruchhausen.

It seems unlikely that the same degree of liability in fact on the part of the indemnitee must be established as would have been established by the plaintiff against the said indemnitee, for the law favors settlements, and if such original liability had to be so clear cut, settlements could rarely, if ever, be made. The result would be that only jury verdicts would establish the right to indemnity, and indemnitors, if they were advised of the original lawsuit and given a reasonable opportunity to defend, would be bound by the findings implicit in the original judgment, i.e., liability and damages. Standard Oil Co. v. Robbins Dry Dock & Repair Co., 2 Cir., 32 F. 2d 182; New York & Porto Rico S. S. Co. of New York v. Lee's Lighters, E.D.N.Y., 48 F. 2d 372; Crawford v. Pope & Talbot, Inc., 3 Cir., 206 F. 2d 784.

As pointed out in Whitmarsh v. Durastone Co., D.C.R.I., 122 F. Supp. 806, 810:

> "The voluntary payment or submission to judgment by a person who thereafter seeks indemnity from the actual wrongdoer does not defeat his right to recovery. It merely varies the degree of proof required to establish the liability of the person from whom such indemnity is sought."

In Fein v. Bonetti, 111 N.Y.S. 2d 840, affirmed 282 App. Div. 868, 125 N.Y.S. 2d 1; reversed on other grounds 307 N. Y. 682, an effort was made by the indemnitor to bind the indemnitee by the testimony against it of the plaintiff in the original action. In its decision, the trial Court said, 111 N.Y.S. 2d 840, 844:

> "Certainly the judgment against plaintiff after the first trial does not preclude the claim here, it not being clear as to just upon what elements the verdict for Mrs. Fein was found."

In Chicago, Rock Island & Pacific Ry. Co. v. United States, 220 F. 2d 939, something of a similar nature arose. The trial Court found that both the original claimant and the indemnitee-plaintiff were "in the exercise of due care and caution in their behalf." The Court rejected the argument that such absence of liability on the indemnitee's part precluded recovery in the indemnity action by the following language, placing such a finding in its proper perspective, at page 941:

> "It does not follow from the finding here that the plaintiff and its employee 'were in the exercise of due care and caution in their behalf' that a similar finding would have been made by the triers of fact in an action by the employee against the plaintiff. Plaintiff at the time it made settlement with the employee did not have the benefit of such a finding. It was required at that time to use its foresight rather than its hindsight in evaluating the situation relative to its probable liability. Taking into consideration that which we all know, that is, the almost insurmountable difficulties attending the defense by a railroad in an action for damages under the Federal Employers' Liability Act, it cannot be said that plaintiff made other than a fair and reasonable settlement of its potential liability. To have resisted settlement to the point of a jury verdict would have been sheer folly under the circumstances."

The rule as to the finality of the adjudication of the original claim is clearly stated in Crawford v. Pope & Talbot, Inc., supra, at page 795:

> "If the indemnitor was not a party to the original action against the indemnitee, and where he was under no duty to participate in the defense of the original action, or where, being under such a duty, he was not

given reasonable notice of the action and requested to defend, neither the indemnitor nor the indemnitee is bound in subsequent litigation between them by findings made in the action. Where, on the other hand, the indemnitee and the indemnitor are co-defendants actively participating in the defense of the original action, or where the indemnitor, with notice of the action and of the indemnitee's request that he defend it, does not participate in the defense but leaves it to the reasonable efforts of the indemnitee, then in subsequent litigation between them both indemnitor and indemnitee are bound by the findings necessary to the judgment in the action."

Perhaps it would not be accurate to substitute the word "settlement" for "judgment" in the above quoted paragraph, but at the same time it would seem improper to go to the other extreme and say that the settling indemnitee, before he could recover, must place himself in the original claimant's shoes and prove claimant's case against himself to the same degree and with the same vigor as would have been incumbent upon the original claimant. The result would be that settlements would be fewer and indemnity claims larger.

Perhaps there may be a distinction between the readiness with which an indemnitee may settle when the basis of his indemnity claim is upon an express agreement to indemnify, Chicago, Rock Island & Pacific Ry. Co. v. Dobry Flour Mills, supra, or upon an agreement to indemnify, implied in fact, Ryan Co. v. Pan-Atlantic Corp., 350 U. S. 124, as opposed to a quasi-contractual agreement to indemnify, referred to as an agreement implied in law, Chicago, Rock Island & Pacific Ry. Co. v. United States, supra.

In the first two instances the indemnitor has taken it upon himself either by express verbiage, or verbiage reasonably to be implied from express verbiage, that he will

stand behind any loss that the indemnitee has suffered. In the latter instance the agreement to indemnify is imposed by law, upon the indemnitor, irrespective of, and often in violation of, his intention. Gallant v. Waterman S. S. Corp., S.D.N.Y., 90 F. Supp. 495. Cf. Hill v. Waxberg, 9 Cir., 237 F. 2d 936, for the distinction between contracts implied in fact and contracts implied in law.

The impleaded defendants in this action left the shipowner indemnitee with almost the whole burden of defeating the original claim. It was the shipowner who attempted to prove claimant's contributory liability, exaggeration of injuries, and absence of any breach of duty to the said claimant, so that if the $30,000 paid in settlement of the case was less than what a jury would have awarded, the shipowner alone deserves the credit.

If the impleaded indemnitors made vigorous objection to settlement with the claimant, it was not in complete keeping with any vigorous effort to defeat the claim originally.

If there is such a distinction between voluntary settlement of a claim when indemnity is based upon contract as opposed to quasi contract, it may lie in the fact that an action based upon quasi contract is practically, if not in fact, a tort. Chicago, Rock Island & Pacific Ry. Co. v. United States, supra; Gallant v. Waterman S. S. Corporation, supra; C. F. Harms Co. v. Erie R. Co., 2 Cir., 167 F. 2d 562; Compare Brown & Root, Inc. v. United States, D.C.S.D. Texas, 92 F. Supp. 257, affirmed 5 Cir., 198 F. 2d 138, wherein such an action was referred to as "ex contracto."

In the answers to the interrogatories the jury did not exactly demonstrate that it was guided by principle. It first decided that $30,000 was a reasonable compromise, and then had to leave the second interrogatory as to whether it was plainly erroneous, if not a reasonable compromise, unanswered. The jury then determined that

$30,000 was not plainly erroneous as to amount (after failing to answer interrogatory #2 which should have preceded this answer by an affirmative response) but plainly erroneous as to liability. If the absence of liability was so plain, then why should payment have been made in the first place? The jury did not require instruction on this subject. The jury, after due deliberation, concluded that there was absolutely no liability on the shipowner's part, and still it thought that $30,000 was a reasonable payment for the shipowner to make to one to whom it owed no liability. The jury could conceivably have awarded a substantial sum of money on the original claim, if that had been left for its determination, rather than by the settlement negotiated by the parties, especially after the original plaintiff's attorney had made his summation. A jury that considers $30,000 as "nuisance value" favored the plaintiff.

Undoubtedly the shipowner's counsel, apparently a lawyer of long and substantial experience sensed this, from the demeanor and reaction of the jurors. Yet it is most unlikely that such a jury verdict could have been set aside or reversed. Cf. Ondato v. Standard Oil Co., 210 F. 2d 233; Dickerson v. Long Island R. Co. 266 App. Div. 852, 42 N.Y.S. 2d 335, motion for leave to appeal denied 266 App. Div. 921, 44 N.Y.S. 2d 344.

Shortly before completing its deliberations, the jury, as to the indemnity claim, inquired as to whether interrogatory B 4 referred to unseaworthiness on the morning of the accident or at the time of the accident. Thereupon both questions were submitted to the jury and the answers were in the negative. While this is not conclusive as to the jurors lack of due consideration, it is an indication of such when added to other inconsistencies.

Another matter should be noted. In question B 3 the jurors were asked as to the nature of the stevedoring con-

tractor's negligence, and they responded by the word "carelessness", which is not particularly enlightening.

The jurors should not be charged with the problems which may have arisen in framing the interrogatories. The Court, in its discretion, prepared them. Skidmore v. Baltimore & O. R. Co., 2 Cir., 167 F. 2d 54. The attorneys, while approving a special verdict, were not in agreement in its preparation. They might have been more helpful if they had acquiesced, as appears to be the object of Rule 48. Perhaps, under subdivision (b) of Rule 48 the jury could have been instructed to clarify the verdict, thus obviating the present difficulties. Yet when the jury submitted its answers, both sides seemed to claim victory, and further deliberation was not requested.

Furthermore, the general law on the subject, as well as the law applicable to this case, is complex and the jury could readily have been confused.

The shipowner based its indemnity claim against the time charterer upon the contractual basis of certain provisions in the time charter. The time charterer used other provisions for its benefit against the shipowner. The instrument itself is long and complex. If the time charter and the facts of the accident were similar to those in The Lewis Luckenbach, 2 Cir., 207 Fed. 66, the liability might be decided one way; if dissimilar, perhaps another. Counsel themselves admitted the paucity of law on this point. On a new trial, they may be in a position to present the matter more clearly and thoroughly.

The time charter also contains certain provisions as to the status of the ship's captain. The case of Logue Stevedoring Corp. v. The Dalzellance, 2 Cir., 198 F. 2d 369, may have some bearing upon ultimate liability under the time charter in that regard.

The time charterer urges that it bears no responsibility to the stevedoring contractor, claiming that the latter was

an independent contractor. Yet power to control the manner of performance of the work may produce responsibility. Gallagher v. United States Lines Co., 2 Cir., 206 F. 2d 177. This might be a question for the jury.

In Newport News Shipbuilding & Drydock Co. v. United States, 4 Cir., 226 F. 2d 137, the Court differentiated between the commercial guarantees of workmanship and materials and the tort guarantees against liability in a certain ship repair contract. Perhaps an analysis of the provisions of the time charter from these aspects on retrial would help.

A clear and thorough presentation of the matters above referred to, on re-trial, will aid both the Court and jury in their determinations.

The shipowner also claims contractual indemnity from the stevedoring contractor claiming that it is an intended beneficiary of certain provisions of a stevedoring contract with the consignee of the freight.

Such a contention would seem to be more logically made by the time charterer rather than the shipowner who was more in privity with the affreightment, but on retrial this issue could be developed more clearly. Cf. Tozar v. Phillips Corporation, D.C.E.D. Pa., 130 F. Supp. 554, affirmed on opinion below, 3 Cir., 226 F. 2d 959.

Finally, the shipowner claims common law indemnity of status, or indemnity implied in law, or quasi-contractual indemnity against the stevedoring contractor. If the United States Supreme Court extends its holding in Ryan Co. v. Pan Atlantic Corp., supra, and agrees with the well established law of New York, Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N. Y. 173; McFall v. Compagnie Maritime Belge, 304 N. Y. 314; Cf. also, Rich v. United States, 2 Cir., 177 F. 2d 688, and permits such common law indemnity despite workmen's compensation insurance, allowing the legislature to rectify any

inconsistencies (as the New York State legislature has done this year), then, depending on the jury's finding of the facts, the stevedoring contractor may be found liable. On retrial, a clearer development of what the law on this point is, or ought to be, would help the Court considerably, and help it to clarify matters or remove the subject from the jury, once it has determined what such law is.

The shipowner has moved for various forms of relief, but in essence, it asks the Court to accept that which favors it and reject the unfavorable. A just determination cannot well be arrived at without a retrial of the entire indemnity issue.

In advance of the new trial, the attorneys for the parties involved should make every effort to stipulate facts and to agree upon matters of law.

The motion for a new trial is granted. Settle order on five days notice.

WALTER BRUCHHAUSEN,
U.S.D.J.

Opinion by Judge Brachhausen.

SPECIAL VERDICT

(A)—SETTLEMENT WITH PLAINTIFF

1. Was the payment by the shipowner of $30,000 in settlement of plaintiff's claim a reasonable compromise under all of the testimony submitted to you on this trial? Yes

2. If no, was the payment plainly erroneous? (not answered)

3. If yes, was it plainly erroneous as to amount? No As to liability? Yes

4. Is it possible that you would have found the shipowner liable?

For negligence? No For seaworthiness? No

5. If answer to 4 is yes, what is the maximum you would have awarded plaintiff for his injuries? (not answered) For negligence? For unseaworthiness?

(B) INDEMNITY CLAIM

1. Were the agents, servants or employees of the stevedoring contractor negligent or careless in any way? Yes

2. If yes, was such negligence the primary and active cause of plaintiff's injuries? Yes

3. If yes, what was the nature of such negligence? Carelessness

Opinion by Judge Brychtausen.

4. (a) Was the ship or its equipment unseaworthy at 8:30 o'clock a.m. on October 27, 1955? No

(b) Was the ship or its equipment unseaworthy at the time of the accident? No

5. Was the ship owner negligent? No

6. If yes, what did that negligence consist of? (not answered)

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SUPREME COURT, U. S.

MOTION FILED MAY 31 1963

IN THE

Supreme Court of the United States

October Term, 1962

No. ~~1595~~ 136

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER,

Respondent.

MOTION AND BRIEF FOR *AMICUS CURIAE*, THE NATIONAL ASSOCIATION OF STEVEDORES, FILED IN SUPPORT OF PETITIONER

MARTIN J. McHUGH,
JAMES M. LEONARD,
Counsel for Amicus Curiae
THE NATIONAL ASSOCIATION OF STEVEDORES,
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New York 38, New York.

INDEX

	PAGE
MOTION FOR LEAVE TO FILE BRIEF *Amicus Curiae*	1
BRIEF OF *Amicus Curiae*	5
INTEREST OF *Amicus Curiae*	6
ARGUMENT:	
POINT I—The action of the Court of Appeals, even accepting, arguendo, its novel rule of law, represents a redetermination of facts found by a jury upon the basis of substantial evidence, and thus constitutes a deprivation of Petitioner's Rights under the Seventh Amendment to the United States Constitution	6
POINT II—The rule promulgated by the Court of Appeals below, to the effect that an indemnitee need only demonstrate that its settlement of a liability claim was "reasonable", is morally invidious, economically unsound and wasteful, contrary to accepted decisional law and a deprivation of property in derogation of due process of law	14
CONCLUSION	20

TABLE OF CASES CITED

	Page
Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., et al., 369 U. S. 355	8, 9
Billeci v. United States, 298 F. 2d 703 (fn. 8)	18
Brown v. United States Fidelity and Guaranty Company, 314 F. 2d 675 (fn. 1)	6
Carballeira v. Isthmian Lines, Inc. v. International Terminal Operating Co., Inc., 189 F. Supp. 525, 190 F. Supp. 801	16
Chicago, Rock Island and Pacific Railway Company v. United States, 220 F. 2d 939 (fn. 7)	17, 18
Ciaglia v. The Hecate Silverblad, et al., 351 U. S. 525 (fn. 9)	19
Dawcett v. A. S. Inger v. Daniels & Kennedy, Inc., 314 F. 2d 336	9, 10
Drewery v. Dosgal Bros. Marine Divers, Inc., decided May 8, 1963, F. 2d —	11
Ellis v. Union Pacific Railroad Co., 329 U. S. 649	8
Ferguson v. Moore McCormack Lines, 352 U. S. 521	18
Gutierrez v. Waterman Steamship Company, No. 229 decided May 13, 1963, — U. S. —, 31 Law Week 4402 (fn. 4)	16
Harris, Trustee in Bankruptcy v. Standard Accident & Insurance Co., 191 F. Supp. 538, rev'd on other grounds, 297 F. 2d 627 cert. den. 369 U. S. 843 (fn. 1)	6, 7
Hellen v. The Mastered Stansfield, 186 F. Supp. 212, 186 F. Supp. 865 (fn. 5)	17
Hooper v. Terminal Steamship Company, 296 F. 2d 281 (fn. 8)	18

	Page
McAllister v. United States, 348 U. S. 19	12
Mitchell v. Trawler Racer, Inc., 362 U. S. 539 (fn. 6)	17, 18
Padeu v. Royal Netherlands Steamship Company v. Maude Dallas, Inc., 303 F. 2d 725 (fn. 8)	18
Rodgers v. Missouri Pacific R. Co., 352 U. S. 500	8
Schulz, Administratrix v. Pennsylvania Railroad Co., 350 U. S. 523	8
Seaboy v. La Crosse Dieksma Corp., 352 U. S. 370	8
Tennant, Administratrix v. Peoria & Pekin Union Railway Co., 321 U. S. 29	8
The Jupiter v. Shoemaker, Administratrix, et al., 358 U. S. 588 (fn. 6)	17
Withers v. McCarthy, et al., Trustees, 336 U. S. 33	18

Statutes

33 U. S. Code Sec. 901 et seq.	13

Miscellaneous

Byrne, Thos. E., Testimony before House Subcommittee on Merchant Marine (fn. 5)	17
Canons of Professional Ethics of the American Bar Association (fn. 10)	19
Corpus Juris Secundum	
Sec. 25 pp. 603-604	14
Sec. 35(a) pp. 625-626	14
Keeton, "Liability Insurance and Responsibility for Settlement", 67 Harv. L. Rev. 1136 (fn. 1)	6

IN THE

Supreme Court of the United States

October Term, 1962

No. 1105

DANIELS & KENNEDY, INC.,
Petitioner,
against
A/S INGER,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

TO THE HONORABLE THE CHIEF JUSTICES OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The National Association of Stevedores respectfully moves this Court, pursuant to Rule 42 (1) of the Revised Rules (1954) for leave to file the accompanying brief as *amicus curiae*. The consent of the petitioner has been obtained. The consent of the respondent was requested but was not granted.

The interests of the movant in this case and its reasons for requesting leave to file the accompanying brief *amicus curiae* appear below.

Movant is a non-profit trade association composed of 99 firms engaged in stevedoring operations in 39 ports of the United States, including all major East, West and Gulf Coast seaports. The Association's home office is in

New York. It has regional offices in Baltimore, Charleston, Cleveland, Honolulu, Mobile and Seattle. Most, if not all, of the principal stevedoring concerns in the United States are members.

Between 70% and 80% of the nation's 150,000 shoremen are employed by the Association's members. These members handled about 70% of all of the cargo lifted in this country.

The interest of the Association and each of its members, as individual stevedoring concerns, are vitally affected by the decision below in that a right to a jury determination has been encroached upon and in that there has been a deprivation of property in derogation of due process.

Aside from these basic issues which, undoubtedly, petitioner will adequately present to the Court, the decision below has created a rule of law which to movant and to the entire shipping community is of major significance and serious concern. The rule would, if allowed to stand, force a stevedore in indemnity actions, to suffer the consequences of [i] willful refusal of shipowners to properly defend against spurious or questionable claims and [ii] suppression of evidence which would tend to erase the initial liability of the shipowner both in order that shipowner might recover not only the amount paid to plaintiff in settlement, but counsel fees and expenses from the stevedore. Additionally, the rule created by the decision below would compel a stevedore to assume the burden of showing that the shipowner's settlement with the plaintiff was "unreasonable".

Such a violent shift in traditional concepts concerning burden of proof can result only in economic waste and an increased accident rate for shipowners will no longer be concerned with safety or the prevention of accidents.

We urge, therefore, in order to correct the errors of the decision below that this Court restate and reclarify the principles of indemnity and in particular where a ship-

owner elects to settle with plaintiff prior to maintaining an action for indemnity against a stevedore that such shipowner be obliged to first establish his initial liability.

Movant, accordingly, requests leave to file the accompanying brief so that these issues which are of great importance to the stevedoring and shipping industries can be presented to the Court.

Respectfully submitted.

MARTIN J. McHUGH
JAMES M. LEONARD
Counsel for The National Association of Stevedores.
150 Broadway,
New York 38, N. Y.

Dated: New York, N. Y.
May 29, 1963.

BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS *AMICUS CURIAE*

The interest of the National Association of Stevedores *Amicus Curiae*.

The National Association of Stevedores is a non-profit trade organization of 99 firms engaged in stevedoring operations in 39 ports of the United States, including all major East, West and Gulf Coast seaports. The Association's home office is in New York. It has regional offices in Baltimore, Charleston, Cleveland, Honolulu, Mobile and Seattle. Most, if not all, of the principal stevedoring concerns in the United States are members.

Between 70% and 80% of the nation's 150,000 longshoremen are employees by the Association's members. These members handle about 70% of all of the cargo lifted in this country.

The interest of the Association in this case is:

1. The individual and direct concern of its members with preservation of the right to a jury trial in indemnity actions.

2. The moral and economic concern with preventing waste, preserving traditional concepts of burden of proof and the concern that the decision below, which grants automatic indemnity to shipowners, fosters rather than prevents shipboard accidents by removing any logical reason for a shipowner to be safety conscious.

ARGUMENT

POINT I

The action of the Court of Appeals, even accepting, *arguendo*, its novel rule of law, represents a redetermination of facts found by a Jury upon the basis of substantial evidence, and thus constitutes a deprivation of Petitioner's Rights under the Seventh Amendment to the United States Constitution.

If we assume, *arguendo*, that the holding of the Second Circuit that "reasonableness"—not liability—is the prerequisite to the recovery of indemnity where the settlement of the indemnitee's liability has been made, nonetheless, the decision of the Appellate Court is violative of the stevedore's Constitutional rights. Furthermore, the action by Judge Bruchhausen in setting aside the special verdict of the jury (D&K Appendix 263a) was in derogation of the stevedore's rights under the Seventh Amendment to the United States Constitution.

A priori, a "reasonable" settlement is one wherein the most probable award that a successful plaintiff would recover (the "exposure") is multiplied by a percentage factor representing the plaintiff's chances of recovery (the "liability discount"). A payment of $50,000 to settle a liquidated damage claim for $10,000 would be, prima facie, "unreasonable." On the other hand, paying $10,000 to

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[1] The Court of Appeals recognized in its opinion that the elements of a "reasonable" settlement must be twofold. It referred to a settlement (1) in an amount reasonable in view of the size of a possible recovery and (2) the degree of probability of claimant's success against the ship. The identical principle was recognized by the very same Court in *Brown versus U. S. F. & G. Co.*, 2 Cir., 314 F. 2d 675. "According to *Harris* v. *Standard Accident and Insurance Company*, 191 F. Supp. 538, reversed on other grounds, 2 Cir. 297 F. 2d. 627, cert. denied, 369 U. S. 843, the "objective criteria"

(Footnote continued on next page)

settle a $50,000 claim where there was absolutely no liability would be just as "unreasonable".

The jury in the basic case found that the payment by Inger was "plainly erroneous" as to "liability". (D&K Appendix 256a-257a)

"3. If yes, was it plainly erroneous as to amount? No As to liability? Yes."

Any construction of the jury's findings which held that the action of the shipowner in settling was reasonable runs into headlong conflict with the jury's answer to Interrogatory A3 that the payment was "plainly erroneous" as to liability.[2]

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of a settlement are (1) "the severity of the injuries", (2) "the probability of a plaintiff's verdict", 191 F. Supp. 540. See also Keeton "Liability Insurance and Responsibility for Settlement", 67 HARV. L. REV. 1136, Note 47 at Page 1153, for an evaluation and application of this concept. Inger's counsel in his testimony recognized the principle and carefully maintained it (D&K appendix 54a-55a, 231a, Inger appendix 57a-61a).

[2] Plaintiffs' ad damnum clause demanded $100,000. In the judgment of his counsel therefore that figure represented the maximum amount he could possibly hope to get. The amount of the settlement is thus 30% of the very most that the plaintiff could have gotten.

Counsel for the shipowner on cross examination testified that "the jury might well have brought in a verdict in my opinion, of anywhere between $50,000 and $75,000" (D&K App. 55a), if the plaintiff succeeded in obtaining a verdict. Accordingly, counsel for the shipowner viewed this as an action wherein the plaintiff had between a 40% to 60% prospect of recovering a verdict. The "might well" qualification constitutes a tacit admission that a plaintiff's verdict "might well" be much below that.

It is hard to characterize the Court of Appeal's belief that this settlement amount represented a reasonable settlement, *in toto*, as anything but bland fantasy when it is considered that the jury could see *no possible liability* on the part of the shipowner. Clearly, the jury viewed the sum of $50,000 as a reasonable estimate of the "exposure" if the shipowner were first held liable.

This Court has said, and often, that the function of a court in dealing with a jury determination is to harmonize the court's views with the jury's findings, not vice versa, to conform rather than disrupt, to accept with humility rather than reject with Olympian disdain. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355; *Rogers* v. *Missouri Pacific R Co.*, 352 U. S. 500; *Senko* v. *La Crosse Dredging Co.*, 352 U. S. 370; *Schulz* v. *Pennsylvania RR Co.*, 350 U. S. 523; *Ellis* v. *the Union Pacific* [illegible] 329 U. S. 649, 653; *Tennant* v. *the Peoria & P. U.* [illegible] 321 U. S. 29.

A jury verdict which holds:

1. That it was *not possible* that the jury would have found the shipowner guilty of negligence (interrogatory A-4) (D&K App. 257a).

2. That it was *not possible* that the jury would have found the ship unseaworthy (interrogatory A-4) (D&K App. 257a).

3. That the settlement was *plainly erroneous* as to liability (interrogatory A-3) (D&K App. 256a)

is simply not consistent with the finding that the settlement was, in toto, reasonable—no matter what judicial legerdemain is applied.

In finding the stevedore liable herein, the Court of Appeals substituted its judgment for that of the jury on a question considered to be factual. This, we submit, was error.

> "But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law.'"

Atlantic & Gulf Stevedores, Inc. against Ellerman Lines, Ltd., 369 U. S. 355, 358, 359.

But the Court of Appeals did even further violence to the jury's findings and to the simple equities of the stevedore's position. According to the jury, the "primary and active" cause of the accident [indeed, the sole cause, when group A of the answers to interrogatories is compared] was "negligence on the part of the agents, servants or employees of the stevedoring contractor" [Interrogatory B-1 and B-2] (D&K Appendix 257a). But the only conclusion permissible from the jury's findings is that the "negligence" of the stevedore's "agents, servants or employees" consisted simply and solely of the plaintiff's misuse of a safe and proper tool. Stevedore simply cannot be said to have been charged by the jury with knowledge of a defective beam jack for the very patent reason that the jury found, as a fact, that the beam jack was not defective.

The shipowner had specifically posited the alleged breach of the stevedore's warranty of workmanlike service upon Peter Damanti and upon no one else. Counsel for Inger explicitly disclaimed, in open court, any intention to hold D&K chargeable with any malfeasance by anyone other than the plaintiff [D&K Appendix 247a]

Thus, the sole fault charged to D&K by the shipowner and the sole fault found to exist on the part of D&K was that of the plaintiff himself.

The Court of Appeals grudgingly recognized this:

> "It is probable that the negligence of the stevedore found by both triers was based solely on the actions of the injured longshoreman" (314 F 2d at 399).

However, the Court refused to give proper legal effect to the issue raised by the jury's express finding.

> "This, however, does not preclude recovery over by the shipowner, but is simply a factor that would reduce the recovery of the injured plaintiff from him.

Pope & Talbot v. Hawn, 346 U. S. 406, 408-409, and thus is to be considered only in determining the reasonableness of the settlement" (314 F 2d at 399).

Having thus determined that the settlement was "reasonable" and that the stevedore had breached its warranty of workmanlike service, the Court of Appeals felt any further analysis unnecessary, and found for the shipowner on the indemnity issue. What is completely lacking, though, from the reasoning of the Court of Appeals is any exploration into the nature of the liability (fanciful or otherwise) which the shipowner allegedly settled in fear of.

Prima facie, a "reasonable" settlement also includes an assessment of the effect that plaintiff's contributory negligence, if any, would have in mitigating any damages he might receive [the "exposure"] under the doctrine of comparative negligence herein applicable. An interesting decision, *Cavalleri v. Isthmian Lines*, D. C. N. Y., 189 F. Supp. 525, 190 F. Supp. 801, holds that any award, in a situation wherein ship's fault and plaintiff's negligence are concurrent, has had, through the operation of the doctrine of comparative negligence, the effect of *completely excising the plaintiff's negligence*. What the jury would have awarded herein, had a verdict been given plaintiff, would have been an amount representing that proportion which the ship's fault bore to the totality of plaintiff's damages. No money award by a jury in plaintiff's favor could have contained any amount representing any fault attributable to the plaintiff.

Therefore, the motivation which allegedly induced the ship to settle was the fear of a money judgment against it, which judgment would relate solely and directly to the ship's own fault—not the plaintiff's negligence.

What then can possibly be the basis for awarding an indemnity in favor of a shipowner when that shipowner has settled wholly and exclusively with regard to that proportion of the causation of the injury which *the shipowner's own fault represents*.

Put another way, logic demands that the indemnity ought be related to the breach of the warranty of workmanlike service. Here that breach is *solely* represented by the negligence of D. K.'s hatch boss, the plaintiff, himself. But Inger paid not one cent to offset Damianti's negligence; it paid $30,000 to avoid the consequence of its own fault.

The Court of Appeals for the Fifth Circuit has squarely held that the negligence of a servant injured because of concurrent negligence on his own and on the part of an outsider cannot be imputed to the master when the outsider seeks to recover indemnity from the master. In a decision construing principles of maritime law: *Brewery v. Dositi Bros. Marine Divers Inc.* decided May 8, 1963 — F2d — the Court said:

> "The doctrine of imputed negligence applies in admiralty . . . Imputed negligence, based as it is on a fiction works to hold the master for injuries to third persons occasioned by the fault of this servant, and to bar the master where his servant contributes or concurs in the harm done the master. We are asked to take the doctrine one step further; to embrace the master through the imputation to the master of the negligence of the servant resulting in injury to himself, to the end of creating liability on the part of the master to an indemnitee under the terms of a contract.
>
> But this additional step does not follow for here no tort against either a third person or the master is present, and the legal fiction of imputed negligence rests on such a tort. Negligence causing injury to one's self will not suffice, for a tort rests on the breach of a legal duty owed another. To take this step would be adding a legal fiction to another legal fiction."

The relation of the Brewery decision to the facts in the case at law is apparent. Equally apparent is the clear conflict between the Court of Appeals for the Second Circuit and the Court of Appeals for the Fifth Circuit. Resolution of this conflict merits consideration by this Court.

Whenever the plaintiff's negligence and the fault charged to his stevedore employer are exactly congruent, as here, it beggars rationality to allow indemnity against the stevedore for an act or omission which has already been excised from the disposition of the main claim, be that disposition by settlement or judgment. Whether the ultimate result be reached by the refusal of the Fifth Circuit to pile one legal fiction on top of another, or by the reasoning of the Court in the *Cavalieri* case, that all plaintiff's fault has been excised,[3] matters little. What matters is that a shipowner should not get a discount from the plaintiff because of his contributing fault and then recover the rest of the settlement from plaintiff's employer because of the very same fault.

The holding of the Second Circuit with respect to Judge Abruzzo's findings

To compound its error the Court of Appeals found that the holding of Judge Abruzzo was "clearly erroneous". The words "clearly erroneous" were used, as if to pay lip service to this Court's holding in *McAllister* v. *United States*, 348 U. S. 19.

The basis for this pronouncement was said, by the Court of Appeals, to be a "review of the entire record". The Court's recitation of those facts of the case which it conceived to indicate Judge Abruzzo's "clear error" consisted simply of an assessment of certain assertions made by the plaintiff.

> "on the liability of the shipowner there was evidence that the beam jack was defective in that it was rusted, pitted, dented, and with its beam holding teeth imperfect, that these defects caused it to slip off the beam and cause plaintiff and the jack to fall

[3] If Cavalieri's reasoning is in error, can D. K. now proceed against Damanti for complete indemnification?

into the hull. Two apparently workable beam jacks were produced at the trial, but a possible inference from the evidence was that the shipowner had concealed and failed to produce the jack involved in the mishap" (314 F. 2d at 398).

Whatever the weight of plaintiff's evidence; it was Judge Abruzzo's function to make a finding with respect to an essential fact—whether or not the shipowner's reaction thereto, the settlement, was in fact "reasonable". Live testimony was received by Judge Abruzzo on this point.

The Court of Appeals, however, felt little restraint in upsetting Judge Abruzzo's decision. His function as a fact finder is somewhat summarily dismissed by the Court of Appeals.

"The court on both trials appears to have ruled as it did in the belief that the determination of no liability on the part of the ship bars recovery over. This, as we have seen, is erroneous, for potential liability is all that is required" (314 F. 2d at 398).

Unfortunately this does less than justice to Judge Abruzzo's decision for he specifically found that Inger's decision to settle was *unreasonable*.

"4. That Inger did not act within the limits of reason in compromising plaintiff's claim" (Inger App. 92a).

Thus, the very fact issue which the Court of Appeals considers dispositive, the "reasonableness" of the settlement, was considered by Judge Abruzzo both on the record of the first trial and on the testimony of live witnesses. His finding with respect thereto is clear and unequivocal.

POINT II

The rule promulgated by the Court of Appeals below, to the effect that an indemnitee need only demonstrate that its settlement of a liability claim was "reasonable", in order to subject an indemnitor to liability over, is morally invidious, economically unsound and wasteful, contrary to accepted decisional law and a deprivation of property in derogation of due process of law.

The pronouncement by the Court of Appeals that the recovery of indemnity from a stevedore may be posited simply on a showing of "reasonableness" of settlement rather than a demonstration of initial liability to the injured man represents a radical departure from the rule as enunciated by virtually every jurisdiction or authority considering the problem. 42 Corpus Juris Secundum Sect. 25 p. 603-604; 42 Corpus Juris Secundum Sect. 35a p. 626 (and decisions cited therein).

Petitioner has treated *in extenso* of the clear conflict between the rationale of the holding of the court below in this respect and the overwhelming weight of precedent. This brief, accordingly, will address itself to a consideration of the consequences of the adoption of any such rule.

Since the complex of interests represented here includes not only injured workers and shipowners but also stevedoring concerns, the fashioning of any rule of law in this area should be considered equally from the viewpoint of the stevedore as from the viewpoint of the claimant and the shipowner.

However, the Court of Appeals of the Second Circuit has sanctioned, nay created, a principle whereby dubious liability claims or claims without legal foundation may be unilaterally settled by shipowners, subject only to a vague and amorphous test of "reasonableness".

Patently, therefore, any shipboard accident can be made the basis of a claim which it is to the shipowner's financial interests to settle on the "reasonable" basis of "exposure". Since an overwhelming mass of longshore accident cases are presently handled through the humanitarian and economically sound mechanics of the Federal Longshoremen's and Harbor Worker's Compensation Act (33 USC Sec. 901 et seq.) the vast expansion of litigated claims against the shipowner implicit in the innovation by the Circuit Court represents a grave and radical threat to the present employer-employee relationships and to the rights of the stevedore-employers.

Obviously, the stevedore's protection against groundless claims urged against shipowners would be completely subverted once his opportunity to challenge the initial liability of the ship is erased, for the impotent stevedore, not the shipowner, would bear the consequences of:

a. A negligent or inept investigation by the shipowner's representatives (compare the instant case wherein the failure of ship personnel to tag adequately the beam jack in question raised a liability doubt in the Court of Appeals).

b. Lackadaisical defense by the shipowner's attorneys where the plaintiff's claim is spurious—but stevedore's fault exists (it seems anomalous to consider that a shipowner's financial interests would be best served by permitting itself to be held liable to a plaintiff).

c. Nonavailability (in a practical sense) of the key witnesses—the plaintiff, his co-employee (nominally stevedore's employees, but actually owing allegiance to each other and the plaintiff) and ship personnel—if the shipowner effects settlement *before* the trial.

d. Suppression of evidence in the hands of the ship which would have strengthened the defense (but

conversely would have weakened the "reasonableness" of its settlement).

e. The temptation to collusion between claimant's attorneys and shipowner's counsel.

f. A violent upheaval in the basic rules as to burden of proof. The stevedore, as third party defendant, would be compelled to shoulder an affirmative burden of demonstrating that the settlement was "unreasonable." If this statement be thought fanciful or exaggerated, consider the very decision of the court below wherein, in the face of a jury finding that it was not possible for the ship to be found liable to the plaintiff, that that the settlement was plainly erroneous as to liability, the Court of Appeals nonetheless found "clearly erroneous" Judge Abruzzo's finding that Inger's settlement was not reasonable).

In view of the above the outlook for the stevedore is bleak. Every shipboard accident represents a potential claim. Every claim represents an ultimate payment by the stevedore of the amount of the settlement, the expenses of litigation, the stevedore's own counsel fees, the counsel fees of the shipowner (it is not overly cynical to suggest that the amount of these fees might be higher were the stevedore paying them than if the shipowner's counsel had to look for reimbursement to his own client), and the expenses of the shipowner.

This, undeniably, is a staggering potential of expense to be faced with in respect to each and every accident occurring on shipboard or in any way connected with a ship.[4] The immunity from suit provisions of the Federal Longshoremen's and Harbor Worker's Compensation Act would cease to have any real meaning whatsoever. Actually, the stev-

[4] Cf. *Gutierrez* v. *Waterman Steamship Company* No. 229 decided May 13, 1963 — US — 31 Law Week 4402.

dore would be in a worse position than if the employee could bring direct suit against the employer, for in addition to the "exposure" of the suit and the costs of defense the stevedore would also be compelled to pay the expenses and the counsel fees of the shipowner.[5]

It is conceded that Maritime Law is largely judge-made. However, the motivations underlying the decision of the Court of Appeals to depart from universally held principles of indemnity remain obscure, but can be inferred somewhat from its allusion to certain language of the Seventh Circuit in the *Chicago, Rock Island* case.

"It (RR) was required at that time to use its foresight rather than its hindsight in evaluating the situation relative to its probable liability. Taking into consideration that which we all know, that is, the almost insurmountable difficulties attending the defense by a railroad in an action for damages under the Federal Employers' Liability Act, it cannot be said that plaintiff made other than a fair and reasonable settlement of its potential liability. To have resisted settlement to the point of a jury verdict would have been sheer folly under the circumstances." *Chicago, Rock Island and Pacific R. R. Co.* v. *U. S.*, 7 Cir., 220 F. 2d 939, 941.

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[5] Litigation procedures are crude and wasteful, often productive of little financial benefit to other than attorneys. Compare, for example, the testimony of Thomas E. Byrne before the House of Representatives Sub-Committee on the Merchant Marine (June 26, 27, 28, 1961) which was considering the Bonner Bill. Mr. Byrne, commenting on the gross economic inefficiency of liability suits, cited the example of the litigation entitled *Holley* v. *the S.S. Manfred Stansfield*, 186 F. Supp. 212, 186 F. Supp. 805. He pointed out that the widow of the deceased longshoreman therein involved netted, as a result of that protracted litigation, the additional sum of $1,597.45 over what she would have received in benefits under the Compensation Act. The process cost the stevedore-employer some $24,293.71 over what its liability should have been under the Compensation Act.

What a tragic economic waste!

[6] *The Tungus* v. *Skovgaard*, 358 U. S. 588, 611. *Mitchell* v. *Trawler Racer*, 362 U. S. 539, 550.

A statement of policy which presumes the inability of a jury to return a verdict fair and equitable to the defendant as well as to the plaintiff seems a poor basis to justify a radical deviation from accepted principles. If it is "sheer folly" to submit to a jury verdict, then something is very, very wrong with our system of jurisprudence.

"Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function." *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62, cited with approval in *Ferguson* v. *McCormick*, 352 U. S. 521, 524.

Whatever the accuracy of the Seventh Circuit's observations concerning the "almost insurmountable difficulties attending defense"[7] in an FELA action they should have little relevancy to the broad class of longshoremen's actions.

In the definitive statement to date on the doctrine of unseaworthiness, this Court took pains to point out that

> "What has been said is not to suggest that the owner is obligated to furnish an accident free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suited for her intended service." *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550.

There is ample justification for the basic proposition that, in longshoremen cases lacking merit, courts and juries are not reluctant to find for the defendant.[8]

What is conspicuously absent from the thinking of the court below is the notion or rather realization that a sub-

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[7] *Chicago, Rock Island and Pacific R. R. Co.* v. *U. S.*, 220 F 2d. 939, 941.

[8] *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F: 2d 752; *Billeci* v. *United States*, 298 F 2d 703; *Hooper* v. *Terminal Steamship Co.*, 296 F. 2d 281.

jective determination as to "reasonableness" is a poor safeguard for the stevedore's rights. Certainly the courts have looked with extreme disfavor upon all situations wherein one party in a three sided controversy affects to bind a second by his unilateral dealings with the third. If there should be a whisper of conflict of interests, this court has not hesitated to insure that the rights of all are protected.[9]

Can it be said that shipowners' counsel have a moral or ethical obligation to consider the rights of the stevedore in determining whether or not to settle a dubious claim? Should the fact that the stevedore will be subjected to a liability which is predicated on no credible evidence be considered by the shipowner's counsel before settling? Is there a dichotomy of fealty which would divide the loyalty of shipowner's counsel between stevedore and shipowner? The tenets of ethical practice would appear to indicate otherwise.[10]

If shipowner's counsel is ethically foreclosed from consideration of the stevedore's equities, if the protection of his client's interests compels shipowner's counsel to preclude the stevedore from contesting the merits of the basic claim, if the settlement of perjurious or manufactured or sham claims is rewarded by full indemnification plus counsel fees then a premium is put upon injustice and the stevedore sinks further into the slough of judicial indifference.

Under the scheme worked out by the Court of Appeals, the stevedore is incapable of securing his share of the law's protection. Apparently, he must acquiesce meekly in the shipowner's capitulation before an insubstantial claim. Or does he assume the defense of the action—and thereby surrender any chance to contest the shipowner's right to indemnification? Whichever he elects, half of his basic rights have been sectioned away.

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[9] *Czaplicki* v. *The Hough Silvercloud*, 351 U. S. 525.

[10] Cf. Canon 6 of the Canons of Professional Ethics of the American Bar Association.

The Association does not know whether considerations of court congestion persuaded the Court of Appeals to act too strongly in favor of settlement to the derogation of stevedore's rights. If so, it would show a disregard on that Court's part for a party's basic rights which are—or should be—paramount to any consideration of expediency.

Experience demonstrates that this sort of reasoning is not only immoral but fallacious. The flood of doubtful or downright spurious claims implicit in the Court of Appeals newly fashioned rule could only lead to more—not less—congestion of court calendars.

Conclusion

The decision below should be reversed for all the reasons urged by petitioner and for the additional reasons of preventing shipboard accidents by creating a greater concern in shipowners and operators for safety, to prevent economic waste, to preserve traditional concepts of burden of proof and to adhere to the morals of the situation by erasing opportunity for fraud and collusion.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 136

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION AND BRIEF OF APPLICANT *AMICUS CURIAE*

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INDEX

	PAGE
Statement of the Case	1
The Court of Appeals Decision	3
The Questions Presented for Review	6
Summary of Argument	7
POINT I—No constitutional question is presented because no constitutional right of D&K was infringed; D&K was not deprived of nor denied its right to litigate with plaintiff; it never claimed the right after the settlement was announced but intentionally waived it by conduct; and the contention is a transparent afterthought	7
POINT II—The ruling that proof of Inger's potential liability to plaintiff was sufficient to establish the reasonableness of the settlement as to liability accords with similar rulings in three other circuits, is contrary to no decision of this Court or any Court of Appeals, and presents no case for certiorari	10
POINT III—The contention that plaintiff's "operational negligence" was the basis upon which petitioner was held guilty of breach of warranty is erroneous. The jury's finding was that the accident was caused by the "carelessness" of the "agents, servants or employees" of petitioner, in other words, petitioner itself. The questions of law sought to be presented upon the basis of the erroneous assumption are therefore academic, not warranting review	13

CASES CITED

PAGE

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 1962, 369 U. S. 355, 364 15

Bass v. Hoagland, 5 Cir., 1949, 172 F. 2d 205, 209, cert. den. 338 U. S. 816 9

California S. & B. Co. v. Pan-Atlantic SS Corp., 1961, 291 F. 2d 252, 254 10

Carabalíese v. Naviera Azmar R. A., 2 Cir., 1960, 285 F. 2d 355, 359 15

Cardinal v. State, 1952, 304 N. Y. 400, 418, cert. den. 345 U. S. 918 11

Chicago R. I. & P. Ry. Co., U. S. 1955, 220 F. 2d 939, 941 10

Cone v. West Virginia Paper Co., 1947, 330 U. S. 212, 217 10

Dugnan v. United States, 1927, 274 U. S. 195, 198 9

Dunn v. Uvalde A.L.P. Co., 1903, 175 N. Y. 218 11

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Gray v. Boston Gas Light Co., 1873, 114 Mass. 149, 153 11

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Gutierez v. Waterman S. S. Corp., 1963, — U. S. —, decided May 13, 1963 4

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Knell v. Feltman, 1949, D. C. Cir., 174 F. 2d 662, 665 3

Kokusai K.K.K. v. Columbia Steve. Co., 1938, 23 F. Supp. 403, 406, affirmed 2 Cir., 100 F. 2d 1016 10

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PAGE

Michalic v. Cleveland Tankers, 1960, 364 U. S. 325, 329-330 ..... 11, 15

Mitchell v. Trawler Racer, Inc., 1960, 362 U. S. 539, 549 13

Palliaga v. Luckenbach SS Corp., 2 Cir., 1961, 301 F. 2d 403, 409 12

Parenzan v. Imo KKK, 2 Cir., 1957, 251 F. 2d 928 15

Penn. R.R. Co. v. McAllister, 2 Cir., 1957, 240 F. 2d 423 11

Reed v. Steamship Yaka, 1963, U. S. , decided May 27, 1963 14

Ryan Steve. Co. v. Pan Atlantic S.S. Corp., 1956, 350 U. S. 124 ..... 13, 14

St. Louis Dressed Beef Co. v. Maryland Cas. Co., 1906, 201 U. S. 173, 181 ..... 10, 11

The Toledo, 2 Cir., 1941, 122 F. 2d 255 11

Treadwell v. United States, 1963, 372 U. S. 772 14

Tugboat Indian Co. v. A/S Ivarans Rederi, 344 Pa. 15 11

United States v. Moore, 1951, 340 U. S. 616, 621 9

Weyerhaeuser S. S. Co. v. Nacirema Op. Co., 1958, 355 U. S. 563, 567 ..... 13, 15

Weyerhaeuser S.S. Co. v. United States, 1963, 372 U. S. 597 14

MISCELLANEOUS

5 Moore, Fed. Pract. (2 Ed.) 10

Restatement of Agency (2 Ed.) §§ 372, 405-407 15

3 CJS Agency §§ 262-266 15

2 Amer. Jurs., Agency §§ 368-370, 374-375, 382 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1105

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION AND BRIEF OF APPLICANT *AMICUS CURIAE*

Statement of the Case

Respondent, A/S Inger, owner of the vessel, SS. Elin Hope, was sued in the Eastern District of New York by one Damanti, employed by petitioner (hereinafter referred to as D&K) as the hatch boss in charge of a gang of 15-16 men engaged in unloading a cargo of newsprint paper from the No. 1 hatch of the vessel (D&K App. 7a-8a). Damanti was seriously injured when he, in place of one of his men, used a beam jack at the 'tweendeck level to assist in moving a hatch beam to enable the paper beneath to be taken out.

Pursuant to Rule 14(a), FRCP, Inger brought in, as parties who might be liable over to it, D&K and also the charterer of the vessel, not a party here. D&K answered not only the third-party complaint but plaintiff's com-

plaint as well (D&K App. 5a) under the provision of Rule 14(a):

> "The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim."

On May 13, 1957 the case came on for trial as to all parties and as to all issues before Judge Bruchhausen and a jury. Pursuant to Rule 14(a) and its answer D&K was entitled to and did, so far as it chose, defend plaintiff's claim against Inger; however, in view of D&K's claims here, Judge Bruchhausen's observation should be noted (Pet. p. 99):

> "The impleaded defendants in this action left the shipowner indemnittee with almost the whole burden of defeating the original claim. It was the shipowner who attempted to prove claimant's contributory liability, exaggeration of injuries, and absence of any breach of duty to the said claimant, so that if the $30,000 paid in settlement of the case was less than what a jury would have awarded, the shipowner alone deserves the credit."

On May 23, 1957, after all parties had rested and summations were due to commence, Inger's counsel in Chambers notified the third parties' counsel that Inger proposed to settle with plaintiff for $30,000 unless the third parties desired to take over the further defense of Inger, in which event the settlement would not be made, saying (Inger App. 53a; see also 54a):

> ". . . before effecting that settlement, the defendant offers formally to each of the third-party defendants the opportunity of stepping into the defendant's shoes in the trial of this action from this time forward, in behalf of the defendant."

The offer was summarily, indeed, scornfully rejected (Inger App. 54a-55a, D&K App. 228a). Thereupon, the

settlement was effected between Inger and plaintiff, plaintiff withdrew from the case without any protest by the third-party defendants, and the trial was continued limited to the third-party issues (Inger App. 57a). After testimony by Inger's counsel with regard to the settlement (Inger App. 58a) the third parties again rested and, following Inger's motion for a directed verdict against the third parties (D&K App. 234a), the third-party issues were submitted to the jury upon a special verdict under 2 series of questions, the first, as to the "Settlement with Plaintiff" and the second, as to the "Indemnity Claim" (Pet. p. 14). Upon the coming-in of the special verdict all parties made various motions, including a renewal by Inger of its motion for a directed verdict (D&K App. 258a-260a), all of which motions Judge Bruchhausen took under advisement; thereafter Inger made a comprehensive motion on papers (Inger App. 63a, D&K App. 266a). Judge Bruchhausen set aside the special verdict and ordered a new trial, denying all other motions (Pet. p. 94, 153 F. Supp. 600).

Following the dismissal by the Court of Appeals of the appeals by the third parties from Judge Bruchhausen's order, all parties waived a jury trial (Pet. p. 16); thereafter the non-jury trial was had before Judge Abruzzo, whose judgment dismissing the third-party complaint as to D&K was reversed by the Court of Appeals.

The Court of Appeals Decision

Concurring with three other circuits and disagreeing with none, the Court of Appeals held (Pet. 71) that proof of Inger's potential liability to plaintiff was sufficient to support the reasonableness of the settlement. So holding it found (Pet. 72-73) that the jury's determination, upon all of the evidence submitted to it, that the settlement was reasonable and the jury's further determination that the accident occurred through D&K's negligence required reversal of the judgment below and direction of judgment in

Inger's favor. The correctness of this decision is not doubtful.

In *Gallick* v. *B. & O. R. R. Co.*, 1963, 372 U. S. 108, this Court reiterated the rule that the court (p. 119):

> ". . . must attempt to reconcile the jury's findings, by exegesis if necessary . . . before we are free to disregard the jury's special verdict."

At bar, the Court of Appeals (Pet. 72-73) applied this injunction and found no difficulty in reconciling the answers of the jury upon the basis of what was properly dispositive of the issues presented for determination.

On the question of the reasonableness of the settlement the jury found (Pet. 14):

> "(A) SETTLEMENT WITH PLAINTIFF.
>
> "1. Was the payment by the shipowner of $30,000 in settlement of plaintiff's claim a reasonable compromise under all of the testimony submitted to you on this trial? Yes."

The Court of Appeals found this to be a complete and sufficient answer to the question of reasonableness, making a brief resumé of the proof both as to liability and damages to indicate the correctness of the jury's response "under all of the testimony". The seeming contradictions between that answer and the jury's answers to further questions as to whether the settlement was "clearly erroneous" as to liability and whether the jury could "possibly" have found Inger liable, the Court of Appeals disposed of (Pet. 73) by the correct ruling that the jury's view of the merits of plaintiff's case as such was irrelevant to the actual issue presented for decision, viz., the reasonableness of the settlement based on potential liability (Cf. Charge, D&K App. 237a, 244a, 246a). Since these were not "proper" questions they were correctly disregarded as immaterial (*Gallick* v. *B. & O. R.R. Co.*, *supra*; *Gutierez* v. *Waterman S.S. Corp.*, 1963, —— U. S. ——, decided May 13, 1963).

The argument of *amicus curiae* on this point loses all semblance of sincerity or seriousness when it is observed that its attributes the jury's answer quoted above to the Court of Appeals as an original, unwarranted, "substituted" finding by the court (Brief, 8), and wholly ignores the fact that the jury made the finding. It ignores it for the obvious reason that it cannot reconcile the sweep of the conclusive effect of the finding with its ostrich effort to give exclusive finality to the subsequent answers to the irrelevant questions 2 and 3. The meaning of the legal concept "clearly erroneous" (Rule 12(a) FRCP) was not explained to the jury in the charge; nor was the concept embodied in question 3 explained to them. Putting their own interpretation upon these questions the jury reasonably concluded that they were intended to elicit what their findings would have been if plaintiff's case had been submitted to them upon the merits. Since such questions were irrelevant to the question of reasonableness based upon potential liability, which implicitly assumed that upon the merits a finding of non-liability on Inger's part was possible, the questions of what the jury would have found if the settlement had not been made was entirely irrelevant. Accordingly, the reconciliation effected by the Court of Appeals adopted the answer to the question No. 1, which embraced the whole issue to be decided, and disregarded the answers to the subsequent questions because they had no bearing upon the issue for decision and were not dispositive thereof. Therefore, the Court of Appeals did not presume itself to determine the question but, in accordance with this Court's admonition, gave effect to the jury's determination of it.

On the question of D&K's breach of its warranty of workmanlike service, the jury found (Pet. 14):

> "(B) INDEMNITY CLAIM
>
> "1. Were the agents, servants or employees of the stevedoring contractor negligent or careless is any way? Yes."

2. If yes, was such negligence the primary and active cause of plaintiff's injuries? Yes.

3. If yes, what was the nature of such negligence? Carelessness."

In view of contentions to be later considered (pp. 13-15), it may be noted that nothing in the answers warrants the assumption that the negligence found was based upon plaintiff's operational negligence.

The Court of Appeals found (Pet. 73) the above answers sufficient to sustain D&K's liability-over for breach of its warranty of workmanlike service, and therefore directed judgment in Inger's favor.

The Questions Presented for Review

The petition (2-6) purports to present for review, in paragraphs and sub-paragraphs, some 14 or more questions or variations of questions. To simplify the task thus presented to the Court, if possible, we have reduced this maze to three general propositions:

1. That constitutional rights under the Fifth and Seventh Amendments were violated in that it was deprived of its right "in its own name" to litigate with plaintiff the question of Inger's liability to plaintiff.

2. That the Court of Appeals' ruling that proof of potential liability of Inger to plaintiff was sufficient to establish the reasonableness of the settlement as to liability, was erroneous.

3. That petitioner could not be held guilty of a breach of its warranty of workmanlike service on the basis of plaintiff's operational negligence.

That none of these contentions has merit or warrants review by this Court may be readily shown.

Summary of Argument

I. No constitutional question is presented because no constitutional right of D&K was infringed; D&K was not deprived of nor denied its right to litigate with plaintiff; it never claimed the right after the settlement was announced but intentionally waived it by conduct; and the contention is a transparent afterthought.

II. The ruling that proof of Inger's potential liability to plaintiff was sufficient to establish the reasonableness of the settlement as to liability accords with similar rulings in three other circuits, is contrary to no decision of this Court or any Court of Appeals, and presents no case for certiorari.

III. The contention that plaintiff's "operational negligence" was the basis upon which petitioner was held guilty of breach of warranty is erroneous. The jury's finding was that the accident was caused by the "carelessness" of the "agents, servants or employees" of petitioner, in other words, petitioner itself. The questions of law sought to be presented upon the basis of the erroneous assumption are therefore academic, not warranting review.

POINT I

No constitutional question is presented because no constitutional right of D&K was infringed; D&K was not deprived of nor denied its right to litigate with plaintiff; it never claimed the right after the settlement was announced but intentionally waived it by conduct; and the contention is a transparent afterthought.

D&K's contention (e.g. Pet. 21, 27) that it was deprived of the right "in its own name" to litigate with plaintiff Inger's defenses to plaintiff's claims is disproved by the record. Patient search of D&K's prolix and diffuse, rather than "direct and concise argument" (Rule 23 [h]), fails

to disclose how and when such deprivation took place, what protest was made against it, and what demand was made for recognition of the right. Manifestly, such deprivation could only have occurred upon the trial before Judge Bruchhausen since, admittedly (Pet. 16), prior to the trial before Judge Abruzzo all parties waived a second jury trial.

Undeniably, prior to the settlement, D&K was afforded full opportunity to litigate with plaintiff (Pet. 7), however meagerly that opportunity was availed of. Accordingly, the deprivation must have occurred, if at all, in connection with and following the settlement proceedings. But when the record is examined it is found that, far from asserting the right, which is now importunately proclaimed to have been infringed, D&K, in effect and in substance, refused to avail itself of that right and more when Inger offered to permit it to take over the defense; and further, far from demanding the right "in its own name (to) question . . . plaintiff's claim against the shipowner . . ." (Pet. 21), D&K vehemently and repeatedly insisted that Inger was required to procure an adjudication of its liability to plaintiff as one of the elements of its claim-over. In Chambers, its counsel said (D&K App. 228a):

> "He has to prove his liability to plaintiff, as against my client . . . He must prove that plaintiff's case from beginning to end against my client and his case against us."

The petition, in a footnote to page 32, sets forth that D&K's contention was (p. 32, footnote):

> ". . . it (Inger) would have to assume plaintiff's burden of establishing its initial liability to him in fact and in law . . .".

It is, of course, settled that the constitutional right to a jury trial must be raised at the appropriate time or be

deemed waived, by "mere acquiescence when the party or his counsel is present and not objecting . . ." (*Bass* v. *Hoagland*, 5 Cir., 1949, 172, F. 2d 205, 209, cert. den. 338 U. S. 816; see also: *Daignan* v. *United States*, 1927, 274 U. S. 195, 198; *United States* v. *Moore*, 1951, 340 U. S. 616, 621; *Knell* v. *Feltman*, 1949, D. C. Cir., 174 F. 2d 662, 665).

At bar, the appropriate occasion for the demand of the right to continue to litigate directly with plaintiff and in such litigation to have the jury determine Inger's liability to plaintiff was when, in open court, Judge Bruchhausen permitted plaintiff to withdraw from the case and limited the remaining issues to be tried to those involved in the third parties' liability for the settlement (Inger App. 57a):

> "'I don't think there is anything for you to do, between the plaintiff and the shipowner. But there are still issues to be tried between the defendant, shipowner, as against the other parties, the time charterer and Daniels & Kennedy.'"

At that point, if it really wished to litigate further with plaintiff, D&K should have asserted that it wished to do so "in its own name" and that for that purpose plaintiff should be required to remain in the case. Its right to make that demand was secured by Rule 41(a)(2) FRCP that after answer filed

> ". . . an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court shall deem proper."

Since D&K had answered the complaint (D&K App. 5a) plaintiff could not have taken a dismissal as to D&K without the latter's consent except by order of the court. If then D&K had really wished to continue to litigate with plaintiff "in its own name" and had objected to any dismissal as against it Judge Bruchhausen would have been called upon to rule whether plaintiff should be permitted

to withdraw as against D&K (5 Moore, Fed. Pract. [2 Ed.], pp. 1018-1025; *Cone v. West Virginia Paper Co.*, 1947, 330 U. S. 212, 217), and an adverse determination would now be subject to review.

Having failed to make any such demand, a failure due to D&K's lack of desire, indeed, refusal, to litigate directly with plaintiff, evidenced by its counsel's unequivocal contention that Inger had the obligation to establish its liability to plaintiff, it is patent that the claim now asserted is wholly an afterthought, without any substance, and that the alleged infringed right was not only not sought but waived by D&K's conduct in seeking to put the burden of proof of liability on Inger.

POINT II

The ruling that proof of Inger's potential liability to plaintiff was sufficient to establish the reasonableness of the settlement as to liability accords with similar rulings in three other circuits, is contrary to no decision of this Court or any Court of Appeals, and presents no case for certiorari.

In the decision below, the Second Circuit (see also *Kokusai K.K.K. v. Columbia Steve. Co.*, 1938, 23 F. Supp. 403, 406, affirmed 2 Cir., 100 F. 2d 1016) has joined the Seventh Circuit (*Chicago R. I. & P. R.R. Co.*, C. C. A. 1955, 220 F. 2d 939, 941), the Third (*Hankinson v. Penn. R.R. Co.*, 1960, 280 F. 2d 249, 252), and the Ninth (*California S. & B. Co. v. Pan-Atlantic SS Corp.*, 1961, 291 F. 2d 252, 254) in holding that proof of facts establishing potential liability of an indemnitee to a claimant is sufficient to support a claim over against the indemnitor for a reasonable amount paid in settlement. This ruling accords not only with reason and justice but with the rationale if not the explicit rulings of this and other high courts (*St. Louis Dressed Beef Co. v. Maryland Cas. Co.*, 1906, 201 U. S. 173, 181; *Leonardi*

v. *Standard Acc. Ins. Co.*, 2 Cir., 1954, 212 F. 2d 887, 890; *Cardinal* v. *State*, 1952, 304 N. Y. 400, 418, cert. den. 345 U. S. 918; *Graf* v. *Boston Gas Light Co.*, 1873, 114 Mass. 149, 153); and, although not explicitly stated, was the basis for holding the indemnitor in *Penn. R.R. Co.* v. *McAllister*, 2 Cir., 1957, 240 F. 2d 423, upon which D&K relies (Pet. 40). That the proof was more than sufficient to make out a case of potential liability (a case which would have had to be submitted to the jury, whose verdict would have been unassailable [e.g., *Michalic* v. *Cleveland Tankers*, 1960, 364 U. S. 325, 329-330]) is established by the brief resumé of the proof in Judge Smith's opinion below (Pet. 72) and is, in effect, conceded (Pet. 10).

Petitioner's copious quotations from various state courts which appear to lay down a contrary rule are neither apposite nor persuasive. Thus, *Tugboat Indian, Co.* v. *A/S Ivarans Rederi*, 344 Pa. 15, upon which petitioner heavily relies, in holding that the pendency of a lawsuit is not such a compulsion as will warrant a settlement (Pet. 45-46) is directly in conflict with the ruling of this Court in the *St. Louis Dressed Beef* case, *supra*, where Mr. Justice Holmes said (201 U. S., p. 182):

> "... a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution."

Nor is it apt to cite decisions holding a case against an indemnitor is not made out where there is *no* proof, viz., a failure of proof, of liability; in other words, where there is no proof of potential liability. Such was the case of *The Toledo*, 2 Cir., 1941, 122 F. 2d 255, which D&K cites (Pet. 39).

The rule applied below accords with the principle laid down in the leading New York case of *Dunn* v. *Uvalde A.L.P. Co.*, 1903, 175 N. Y. 248, quoted by D&K (Pet. 42) that to support a settlement the indemnitee must "prove the

actionable facts upon which his liability depends", language adopted by *Corpus Juris Secundum* (Pet. 38-39). The attempt to equate this rule with adjudication of liability upon conflicting evidence is palpably erroneous. If such an adjudication had been meant the court surely would have said so. What was meant was that, to avoid the charge of being a mere volunteer, the indemnitee is required to prove that it settled under the compulsion of facts which established potential liability.

The contention of *amicus curiae* (Brief, 14) that the rule of potential liability is "invidious (and) economically unsound" besides being irrelevant to any legal question is plainly groundless. The facts with respect to an accident are best known to the stevedore because the operations are carried on by the stevedore and the men directly involved therein are its men and its supervisors of them, men who, while readily available to the stevedore's investigators are not available to the shipowner except by the stevedore's sufferance. If the defense of an action is "lackadaisacal", as was D&K's before Judge Bruchhausen (p. 2, *infra*) the stevedore has only itself to blame since Rule 14(a) gives it full opportunity to present the shipowner's defenses.

On the other hand, the stevedores completely ignore the shipowners' at least equal right to settle, when confronted with the claims of the stevedores' employees which the stevedores refuse to defend. They would have the shipowners carry the litigation to the bitter end, at the latter's expense and risk, because the stevedore is unwilling to settle or hopes the claimant may lose. The right, in good faith, to settle, is thoroughly established and its practice is judicially encouraged (e.g., *Palliaga* v. *Lackenbach SS Corp.*, 2 Cir., 1961, 301 F. 2d 403, 409). That right would be seriously impaired and its encouragement a kind of entrapment if the reasonableness were later to be judged by the subsequent adjudication of liability upon conflicting evidence, some of which might be lost or unavailable.

At bar, if D&K was so confident of the jury's verdict as against plaintiff it would have attested its confidence by demanding that plaintiff remain in the case and submit his claims to the jury. Its refusal so to do challenges its good faith. So in future practice, a stevedore may always protect itself by prompt use of the facilities of investigation which are most fully available to it, and by joining in or taking over the defense if it believes that proper or adequate presentation thereof is not being made.

The ruling below was, therefore, correct. Moreover, no showing has been made of any conflict with other courts within the provisions of Rule 19(1)(b), necessary to warrant certiorari.

POINT III

The contention that plaintiff's "operational negligence" was the basis upon which petitioner was held guilty of breach of warranty is erroneous. The jury's finding was that the accident was caused by the "carelessness" of the "agents, servants or employees" of petitioner, in other words, petitioner itself. The questions of law sought to be presented upon the basis of the erroneous assumption are therefore academic, not warranting review.

Erroneously contending (Pet. 58) that "the sole cause of the accident was plaintiff's operational negligence" D&K, and also *amicus curiae* (Brief, 9) argue that such negligence could not support a charge of breach of warranty against D&K.

Beyond argument, D&K's obligations under its warranty of workmanlike service were distinct from those of Inger to plaintiff (*Ryan Stevc. Co. v. Pan-Atlantic S.S. Corp.*, 1956, 350 U. S. 124, 134; *Weyerhaeuser S. S. Co. v. Nacirema Op. Co.*, 1958, 355 U. S. 563, 567; *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U. S. 539, 549). The only factual de-

termination on that issue was made by the jury, Judge Abruzzo not reaching the question (Pet. 85-86). As we have heretofore pointed out (p. 6, *infra*) the jury's answers on the "Indemnity Claim" made no mention of plaintiff; therefore, the contention that plaintiff's operational negligence was the sole or even any basis for the finding of D&K's breach of warranty is an unsupported unwarranted assumption without any support in the record. To the contrary, the jury's finding that the accident was caused by the "carelessness" of D&K's "agents, servants or employees" placed the responsibility squarely on D&K's shoulders and not plaintiff's. This was in accord with the charge which did not limit the jury's consideration of the issue to plaintiff's conduct but authorized consideration of all of the evidence bearing upon D&K's performance (D&K App. 241a-243a). The contention of *amicus curiae* (Brief, 9) that Inger's claim against D&K was limited to plaintiff's operational negligence is incorrect. Examination of the citation to the record in support of the contention (D&K App. 247a) discloses that Inger's request to charge was merely that D&K was bound by whatever knowledge plaintiff had, with no reference being made to plaintiff's negligence, operational or otherwise.

The premise being unfounded, the questions of law sought to be presented thereon are academic and illusory and therefore neither present questions for certiorari or consideration here.

Even so, it may be pointed out how erroneous is the assumption that the workmen's compensation shield is a complete answer to D&K's liability for breach of warranty insofar as it is founded by plaintiff's faulty performance (*Ryan Stev. Co. v. Pan-Atlantic S.S. Corp.*, *supra*, pp. 131-132; *Weyerhaeuser S.S. Co. v. United States*, 1963, 372 U. S. 597, 602-604; *Treadwell v. United States*, 1963, 372 U. S. 752; *Reed v. Steamship Yaka*, 1963 U. S. , decided May 27, 1963).

At bar, plaintiff was more than a mere workman: he was clothed with the supervisory duties of a foreman by being made hatch boss over a gang of 15 or 16 men (Inger App. 7a-8a, 79a-80a). In that capacity he stood for D&K in carrying out its obligation of workmanlike service; his knowledge was its knowledge, and his substandard performance was its substandard performance (Restatement of Agency (2 Ed.) §§ 272, 495-497; 3 CJS Agency §§ 262-266; 2 Amer. Juris., Agency §§ 368-370, 374-375, 582; *Greenspahn v. Seagram*, 2 Cir., 1950, 186 F. 2d 616, 619, 620; *Caraballese v. Naviera Azmay R. A.*, 2 Cir., 1960, 285 F. 2d 355, 359; *Parenzan v. Iimo KKK*, 2 Cir., 1957, 251 F. 2d 928). Furthermore, the concession that D&K had made no prior inspections of the beam jacks and left it to its men to do so at their own risk (Inger App. 43a, 76a, 80a) was further proof, *inter alia*, to support the finding of D&K's "carelessness" and, in consequence, breach of warranty (*Weyerhaeuser S.S. Co. v. Nacirema Co.*, *supra*; *Michalic v. Cleveland Tankers, Inc.*, *supra*; *A. & G. Stevedores, Inc. v. Elderman Lines, Ltd.*, 1962, 369 U. S. 355, 364).

Since the finding of the jury was supported by the evidence and followed the charge it was properly held conclusive on the question of D&K's breach of warranty.

The petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 136

DANIELS & KENNEDY, INC.,

Petitioner,

against

A. S. JNGER,

Respondent.

PETITIONER'S REPLY BRIEF

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June 10, 1963

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I

Inger argues that when the case was ready to go to verdict on both plaintiff's claim and the claim over D & K was obliged to surrender its identity and right to go to the jury on the claim over—D & K's second line of defense—in order to preserve its other right to go to the jury on plaintiff's claim against Inger—D & K's first line of defense.

But, Rule 14(a) explicitly guaranteed D & K full and unconditional possession and use of both rights on its own and not by Inger's grace or sufferance.

Clearly then the law did not invest Inger with dictatorial power to force D & K to forfeit, waive, surrender or diminish one valuable and substantial right to preserve the other.

When the jury found against plaintiff's claim the Court of Appeals and Judge Bruchhausen violated D & K's 7th Amendment and due process rights under Rule 14(a) by refusing to honor D & K's right to exoneration from liability. (See Petition pp. 24-33.)

Violation of these basic rights cannot be justified by these Courts likings for a settler or a settlement. (See e.g. *Wolff v. Lavorine, Inc.*, 17 A. D. 2d 213, Petition, pp. 55-56).

II

Unable to meet the petition's Point II, Inger attempts to dodge it by an argument which is seriously

pressed, on its face mandates summary reversal of the judgment without even the need for argument on certiorari.

Inger claims that D&K's workmanlike service warranty was breached because plaintiff, a D&K supervisory employee, was derelict in knowing that the beam jack was defective [and presumably in using it without halting work].* It expressly disclaims charging D&K with a breach on any ground that plaintiff was guilty of operational carelessness.

But, any issue as to plaintiff's (or for that matter anyone's) knowledge of a defect was finally and forever concluded by the jury's finding that there was, in fact, no defect in the jack when it found no unseaworthiness or negligence.

Thus, if it is being said that the Court of Appeals agreed with Inger's present contention that D&K was liable by virtue of plaintiff's supervisory misfeasance referrable to a defective jack, it is being said that the Court overstepped its permissible bounds by rejecting and redetermining the clear jury holding that the beam jack was not defective.

Any such appellate determination charging D&K with a breach of warranty referrable to a condition which the jury said never existed being posited directly on the rejection of a jury finding collides with the 7th Amendment and must fall.

Leaving fantasy and returning to fact, the jury's findings easily and properly harmonized with one another against the background of the pleadings, evidence and

* At the trial Inger expressly abjured reliance upon any claim that D & K was chargeable with any fault, failing, or knowledge referrable to the beam jack, other than through plaintiff himself. It argued that plaintiff's conduct, and that of no other D & K

charge, demonstrates that the jury found plaintiff's carelessness in his use of the non-defective jack was the sole cause of his accident. These same findings were made by Judge Abruzzo (Pet. 84, 85-86), and the Court of Appeals acknowledged that both fact triers had so found (Pet. 74).*

CONCLUSION

The petition for a writ of certiorari should be granted.

June 10, 1963.

Respectfully submitted,

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* Clearly any view of this case demonstrates conflict with *Dressner v. Pacific Dr. & Marine Equip. Inc.*, 5 Cir. ——, F. 2d ——, 31 LW 2575, 2576, since plaintiff's conduct was and is pressed as basis for D & K liability.